313 U.S. 570

Office-Supreme Court, U.S.
FILED
APR 4 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 921

FUNKS GROVE GRAIN COMPANY,

Petitioner,

vs.

THE ALTON RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

U. S. Law Printing Co., 54 W. Illinois St., Chicago

SUBJECT INDEX

	PAGE
Petition for writ of certiorari	1
A. Summary statement of the matter involved	2
I. Proceedings in court	2
II. The facts involved herein	2
B. Basis of jurisdiction herein	6
C. The Questions presented	7
D. Reasons relied on for the allowance of writ	8
Prayer for writ	10
Brief in support of petition for writ of certiorari	12
I. Opinion of the court below	12
II. Basis of jurisdiction herein	12
III. Specifications of error	14
IV. Argument	15
1. The United States Circuit Court of Appeals herein erred in attributing to an act of the Illinois Commerce Commission (Exhibit "D") a meaning and effect forbidden by the statute authorizing its issuance	15
2. The act authorizing the order, Exhibit "D," in this case did not confer upon the Illinois Commerce Commission any jurisdiction to pass a legislative act	20

3. The uniform practice and procedure which has obtained before the Illinois Commerce Commission for many years past is that the effect of a schedule of reasonable maximum rates, when introduced into evidence before the Commission, is only *prima facie* proof, placing the burden upon the complainants of proving that such rates are unreasonable. The decision of the Circuit Court of Appeals destroys a common law and statutory right heretofore inherent in the residents of the State of Illinois..... 24

4. The decision of the United States Circuit Court of Appeals herein is contrary to the decisions of said Court in the Fifth Circuit, wherein similar orders were held to be ineffective as legislative acts because they did not establish specific rates for the transportation involved and that rates adopted under similar circumstances were carrier-made rates and always open to inquiry as to their reasonableness 27

5. The United States Circuit Court of Appeals in its opinion erred in construing the holdings in C. B. & Q. R. R. Co. v. Jones, 149 Ill. 361, C. B. & Q. R. Co. v. The People, 77 Ill. 443, Public Utilities Commission v. A. T. & S. F. Ry. Co., 278 Ill. 58, and Arizona Grocery Company v. A. T. & S. F. Ry. Company, 284 U. S. 370, and in the conclusions drawn therefrom 32

6. The District Court correctly interpreted the law herein in holding that the rates com-

plained of being carrier-made, the Commission had power to grant reparation due to their being unjust, excessive and discriminatory 43

Conclusion 46

AUTHORITIES CITED.

Arizona Grocery Company v. A. T. & S. F. Ry. Company, 284 U. S. 370, 388 ..... 8, 30, 32, 42

Barrett v. Reuter, 289 Ill. App. 221, 230 27

Barris v. Chicago, B. & Q. R. Co., 102 Iowa 375, 71 N. W. 339, 341, 63 Am. St. Rep. 449, 97 A. L. R. 406n, 426n 35, 44, 45

Brimstone Case, 276 U. S. 104, 48 S. Ct. 282, 72 L. Ed. 487 ..... 31, 32

C. B. & Q. R. R. Co. v. Jones, 149 Ill. 361, 381, 382 ..... 7, 20, 21, 27, 32, 33, 34, 37, 39, 41

C. B. & Q. R. Co. v. The People, 77 Ill. 443 ..... 7, 32, 33, 37, 39

C. T. & T. Co. v. Central Republic Trust Co., 299 Ill. App. 483, 496 27

Commerce Com. v. C. C. C. & St. L. Ry. Co., 320 Ill. 214, 219 ..... 24, 25

Comstock v. Cover, 35 Ill. 470 27

Eagle Cotton Oil Co. v. Southern Ry. Co., 51 Fed. (2d) 443, 445 ..... 30, 31, 32

Forsyth v. Hammond, 166 U. S. 506, 514, 515, 17 S. Ct. 665, 41 L. Ed. 1095 13

Great Northern R. R. v. Sunburst, 287 U. S. 358, 53 S. Ct. 145, 77 L. Ed. 360, 85 A. L. R. 254 31

Illinois Commerce Commission cases 25, 26

Montana Horse Products Co. v. Great Northern Ry. Co., 7 Pac. 2nd 919, 921, 923 ..... 43, 44

People v. Fidelity and Casualty Co., 153 Ill. 25, 39..... 27

Public Utilities Com. v. A. T. & S. F. Ry. Co., 278 Ill. 58, 69 ..... 8, 24, 25, 32, 35, 38, 39, 41, 42

Public Utilities Com. v. C. & W. T. Ry. Co., 275 Ill. 555, 566, 567, 568, 569 ..... 22, 23, 40

Texas & Pacific Ry. Co. v. Louisiana Oil & Refining Co., 76 Fed. (2d) 465, 468, et seq. 30, 31, 32

The People v. Brady, 271 Ill. 100, 105 21

United States v. Louisiana, 290 U. S. 70, 54 S. Ct. 28, 78 L. Ed. 181 32

STATUTES.

Illinois Constitution of 1870, Article II, Section 19..... 40

Illinois Revised Statutes, 1939, Chapter 111 2/3:

Section 32 ..... 9, 10, 15

Sections 37 and 39 38

Section 41 10

Section 60 15

Section 72 ..... 10, 16, 40

Section 87 18

Illinois Revised Statutes, 1939, Chapter 114:

Section 8 ..... 8, 10, 17, 18, 19, 20, 21, 39, 41, 45, 46, 47

Interstate Commerce Act:
Section 13 (1) 43
Section 15 ..... 42, 43
Judicial Code, Section 240, as amended:
(Title 28, Section 347 (a)) 6, 12

---

9 Am. Jur. Sec. 175 43
Annotations 97 A. L. R. 406n, 426n 43, 44

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

NO.

FUNKS GROVE GRAIN COMPANY,
Petitioner,

v.

THE ALTON RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS IN AND FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

May It Please the Court:

The petition of Funks Grove Grain Company respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

I.

Proceedings in Court.

On the 8th day of May, 1940 a judgment was entered by the United States District Court in and for the Northern District of Illinois, Eastern Division, in favor of the petitioner against the respondent for the sum of $2,150.63, as damages and costs of suit, wherein the Court taxed the Master's fees at the sum of $100.42 and attorneys' fees at the sum of $215.06 (Tr. 258, 259).

This judgment was one of seven judgments entered in favor of several claimants against the respondent (Tr. 226, 258), the other six thereof now standing on motions for a new trial to abide final disposition of petitioner's judgment.

An appeal was taken by respondent to the United States Circuit Court of Appeals in and for the Seventh Circuit (Tr. 260-263) which reversed the judgment on December 14, 1940 (Tr. 281-292). A petition for rehearing was filed December 28, 1940 (within the time allowed by the rules of court) by the petitioner, which petition was denied February 21, 1941 (Tr. 292).

II.

The Facts Involved Herein.

The claim of the claimant herein is for reparation on account of excessive charges exacted from it contrary to law in the operation of the railroad by the Court's Re-

ceivers (Tr. 99) and are unpaid administrative expenses.

The main suit—*Texas Company* v. *C. & A. R. Co.*, was brought to foreclose a mortgage on the railroad property and its assets (Tr. 93, 94). The Court on or about August 30, 1922 appointed William W. Wheelock and William G. Bierd, Receivers, to operate the railroad pending the foreclosure proceeding. Said Receivers accepted the appointment and operated the railroad up to the time of their discharge on July 18, 1931 (Tr. 178-181).

This claimant being one of seven (Tr. 226), was consignee of bituminous coal transported by the Receivers in intrastate commerce, and paid and bore the transportation charges made against it by the Receivers (Tr. 115-116).

Said claimant jointly with others seasonably filed their complaint with said Illinois Commerce Commission on August 30, 1924, alleging that the rates charged and collected by the Receivers were excessive, unjust, unreasonable and unjustly discriminatory, in violation of the Public Utilities Act, and asked the Illinois Commerce Commission to fix and determine what would be the just, reasonable and non-discriminatory rates for the shipments and award reparation, as by the Public Utilities Act provided (Tr. 98-101). An answer was filed by the Receivers to said complaint (Tr. 101) and after full hearing the Commission by its finding and order dated May 26, 1931 (Tr. 98-117) found the rates which had been exacted from the complainants were excessive and also found what would have been the just, reasonable and non-discriminatory rates which should have been charged for such shipments (Tr. 115), also found that reparation should be awarded claimant upon said shipments, but

directed that the complainants and the defendants adjust the amount thereof by compromise, private negotiation and settlement (Tr. 116).

The case in the District Court proceeded to a decree of foreclosure and sale, which was entered on the 6th day of July, 1929. This decree directed that the purchaser or its assignee as a part of the purchase price pay, satisfy and discharge to the extent that the same shall not have been paid out of moneys in the possession of the Receivers all unpaid indebtedness and liabilities of the Receivers incurred in the management or operation of the railroad properties in their possession (Tr. 93-94).

The Alton Railroad Company became the assignee of the purchaser at said sale and assumed the obligation to pay all unpaid liabilities of the Receivers (Tr. 53).

The Court in its order discharging the Receivers entered November 9, 1931, directed that all claims should be filed with the Court on or before February 4, 1932. In accordance with this order claimant, not having been able to adjust them, filed its claim on or about February 2, 1932 (Tr. 178-181).

A motion was made by The Alton Railroad Company to strike the claim for the reason that the order of May 26, 1931 was incomplete and the Special Master to whom the subject matter was referred by his report recommended that the motion be granted. This report, however, was thereafter vacated and set aside by the Court (Tr. 37).

Thereafter on October 6, 1937 claimant with others filed with the Commission a petition called herein "First

Supplemental Petition" (Tr. 181-184), wherein after stating the facts, asked the Commission to complete by supplemental order finding the precise amount of the reparation. This the Commission did after full hearing by its order of March 17, 1939 (Tr. 118), and after the entry of the order of March 17, 1939 claimant filed an amendment to its original claim in the District Court, alleging specifically the amount of the damages, interest and costs to which it was entitled, making said orders of May 26, 1931 and March 17, 1939 a part thereof (Tr. 38-40).

The District Court referred the claim to Honorable Charles A. McDonald, Master in Chancery, who heard the evidence and made his reports (Tr. 217 and 248). On the hearing before the Master the petitioner introduced into evidence the final decisions and orders of the Illinois Commerce Commission, Exhibit "1" (Tr. 98) and Exhibit "2" (Tr. 119), also Exhibit "3" (Tr. 130), a letter of the Secretary of the Commission relative to the granting of a rehearing, Exhibit "4" (Tr. 131), Exhibit "5" (Tr. 150), former orders entered by the Commission on the hearing of the case, also Exhibit "6" (Tr. 178), being the order entered by the District Court discharging the Receivers and providing for the assumption of payment of unpaid claims incurred by the Receivers, and other facts necessary to make a *prima facie* case were stipulated. The respondent introduced into evidence Exhibit "A" (Tr. 181), the First Supplemental Petition, Exhibit "B" (Tr. 185), the petition for rehearing and order denying First Supplemental Petition, Exhibit "D" (Tr. 194), the order as to the Schedule of Reasonable Maximum Rates of Charges, and Exhibit "E" (Tr. 215), a map showing the points of origin and destination of the shipments involved. Respondent also produced Witness

Behrle (Tr. 80 *et seq.*), who testified as to Exhibit "E" and on cross-examination admitted that Exhibit "D" did not purport to cover any specific shipments.

The Master held, among other things, that this Exhibit "D" being introduced into evidence before the Commission, which gave to it *prima facie* effect on proof of the reasonableness of the charges and all the evidence, including that which would rebut said effect not being introduced before him, that the claims were properly proven and recommended that judgment be entered (Tr. 250).

The Court adopted the findings of the Master, overruled the objections of petitioner and respondent, and entered judgment, as hereinbefore set forth (Tr. 257-259).

On appeal the Circuit Court of Appeals reversed the District Court assigning as the principal reason that the *obiter dictum* found in a subsequent case in the State Supreme Court overruled a prior decision of that court to the contrary.

The District Court held that a schedule of reasonable maximum rates adopted by the Commission was by reason of the statute authorizing it only *prima facie* evidence as to the reasonableness of the rates in question. The Circuit Court of Appeals reversed the District Court holding that the said schedule of reasonable maximum rates was a legislative act and forbid the awarding of reparation on rates within the limits of the schedule.

B.

Basis of Jurisdiction Herein.

Jurisdiction herein conferred by Section 240, as amended, of the Judicial Code, Title 28, Section 347 (a).

C.

The Questions Presented.

1. The United States Circuit Court of Appeals herein erred in attributing to an Act of the Illinois Commerce Commission (Exhibit "D") a meaning and effect forbidden by the statute authorizing its issuance.

2. The act authorizing the order (Exhibit "D" herein) did not confer upon the Illinois Commerce Commission any jurisdiction to pass a legislative act.

3. The uniform practice and procedure which has obtained before the Illinois Commerce Commission for many years past is that the effect of a schedule of reasonable maximum rates, when introduced into evidence before the Commission, is only *prima facie* proof, placing the burden upon the complainants of proving that such rates are unreasonable. This decision destroys a common law and statutory right heretofore inherent in the residents of the State of Illinois.

4. The decision of the United States Circuit Court of Appeals herein is contrary to the decisions of said court in the Fifth Circuit, wherein similar orders were held to be ineffective as legislative acts because they did not establish specific rates for the transportation involved, and that rates adopted under similar circumstances were carrier-made and always open to inquiry as to their reasonableness.

5. The United States Circuit Court of Appeals in its decision erred in construing the holdings in *C. B. & Q. R. R. Co.* v. *Jones*,[1] *C. B. & Q R. Co.* v. *The People*,[2] *Public*

[1] 149 Ill. 361.
[2] 77 Ill. 443.

Utilities Com. v. *A. T. & S. F. Ry. Co.*,[3] and *Arizona Grocery Company* v. *A. T. & S. F. Ry Company*,[4] and in the conclusions drawn therefrom.

6. The District Court correctly interpreted the law herein in holding that the rates complained of being carrier-made, the Commission had power to grant reparation due to their being unjust, excessive and discriminatory.

D.

Reasons Relied On for Allowance of Writ.

1. The decision of the United States Circuit Court of Appeals herein conflicts with the decisions of the State Supreme Court of Illinois by in effect overruling the state decisions, basing its conclusion upon a mere *obiter dictum*, thereby upsetting the practice and procedure of collecting reparation from carriers, which has obtained in Illinois since the organization of the Illinois Commerce Commission.

2. The decision of the United States Circuit Court of Appeals herein is in conflict with the decision of the United States Circuit Court of Appeals in the Fifth Circuit involving similar principles.

3. The decision of the said Circuit Court of Appeals herein decided an important question of local law contrary to applicable local decisions.

The Supreme Court of the State of Illinois has interpreted Section 8[5] of the act to prevent extortion, etc., to allow the Illinois Commerce Commission to prescribe a schedule of reasonable maximum rates, which would be

---

[3] 278 Ill. 58.
[4] 284 U. S. 370.
[5] Chap. 114, I. R. S. 1939, S. B. A. Ed., par. 125, p. 2591.

a rule of evidence only and not a legislative act. While said Circuit Court of Appeals' decision has held that such a schedule of reasonable maximum rates is a legislative act and not a rule of evidence.

4. The decision of the said Circuit Court of Appeals herein has departed from the accepted and usual course of judicial proceedings.

The accepted and usual course of judicial proceedings in cases of like character has been to consider orders such as Exhibit "D" merely a rule of evidence, placing the burden of proof upon the protestants to show that the rates complained of were excessive, unreasonable and unlawful, which duty was invested in the Illinois Commerce Commission by Section 32[6] of the State Public Utilities Act. The Circuit Court of Appeals by its decision has departed from this rule and held that the order, Exhibit "D" herein, was legislative and conclusive in its effect.

5. The decision of the said Circuit Court of Appeals herein overrules the contemporaneous construction placed upon an Illinois statute by the Illinois Commerce Commission and Illinois courts, which would prohibit the functioning of the Commission in allowing reparation on account of unreasonable, excessive and discriminatory freight rates to Illinois shippers, thereby presenting an important question of public interest.

6. The decision of the said Circuit Court of Appeals herein attributes to a schedule of reasonable maximum

[6] Chap. 111⅔, I. R. S. 1939, S. B. A. Ed., par. 32—111⅔, Sec. 32.

rates (Exhibit "D" herein) a legislative effect when the same is only a rule of evidence.

7. The decision of the said Circuit Court of Appeals herein in effect, deprives the citizens of the State of Illinois of their common law and constitutional rights.

8. The decision of the said Circuit Court of Appeals herein is contrary to the decisions of the State Supreme Court, which specifically hold that if the passage of an order authorizing a schedule of reasonable maximum rates is considered legislative in character, it would be unconstitutional.

9. The decision of the said Circuit Court of Appeals herein erroneously followed decisions in other states wherein state statutes imposed upon Commissions the specific duty of fixing rates as a legislative act, while no such or similar statute is found in Illinois.

In Illinois the Commission by Section 8 [7] of the Extortion Act is empowered to fix a reasonable maximum rate as a rule of evidence only. Section 32 [8] of the Public Utilities Act prohibits the collection of unreasonable, excessive and discriminatory rates, and Sections 41 [9] and 72 [10] thereof invest the Commission with the uncontrolled power and duty of determining the reasonable, non-excessive and non-discriminatory rates and of allowing reparation for excessive and non-discriminatory rates exacted by the carriers.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of

---

[7] Chap. 114, I. R. S., S. B. A. Ed., par. 125, p. 2591.
[8] Chap. 111⅔, I. R. S., S. B. A. Ed., par. 32, 111⅔, Sec. 32.
[9] Chap. 111⅔, I. R. S., S. B. A. Ed., par. 41, 111⅔, Sec. 41.
[10] Chap. 111⅔, I. R. S., S. B. A. 7d., par. 76, 111⅔, Sec. 72.

this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case, entitled *The Texas Company et al., complainants* v. *The Chicago & Alton Railroad Company, et al., defendants. Funks Grove Grain Company, claimant-appellee,* v. *The Alton Railroad Company, defendant-appellant,* No. 7358, to the end that the said case may be reviewed and determined by this Honorable Court and that your petitioner may have such other or further relief or remedy in the premises as this Court may deem appropriate and that the said judgment of the said Circuit Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court.

Funks Grove Grain Company,
Petitioner,

By Thomas B. Lantry
C. B. Cardy
William F. Garman
Attorneys for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940.

No.....

FUNKS GROVE GRAIN COMPANY,

Petitioner,

v.

THE ALTON RAILROAD COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Court below will be found at pages 281-291 of the record.

II.

Basis of Jurisdiction Herein.

Jurisdiction herein is conferred by Section 240, as amended, of the Judicial Code, Title 28, Section 347 (a).

It will be noticed that said section, Title 28, 347 (a) gives to this Honorable Court power to review any case decided by the Circuit Court of Appeals and since the abrogation of all review by repeal or writ of error, the statute being remedial should be liberally construed.

While the exercise of jurisdiction is discretionary, we think that particularly because of the conflict between the decisions of the Circuit Court of Appeals and our State Supreme Court, and for the other reasons relied on, this jurisdiction should be exercised herein, as was said in *Forsyth* v. *Hammond*,[11] wherein was involved the question of a conflict of the decisions of the Supreme Court of the State and Federal Court of Appeals respecting the validity of the annexation of a territory to a city, and the Court said on pages 514 and 515:

> "We reaffirm in this case the propositions heretofore announced, to wit, that the power of this court in certiorari extends to every case pending in the circuit courts of appeal, and may be exercised at any time during such pendency, provided the case is one which but for this provision of the statute would be finally determined in that court. And further, that while this power is coextensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise.
>
> "Among the considerations thus suggested are those which indicate why in this case the court properly exercised its power and issued the writ of certiorari. There was a conflict between the decision of the circuit court of appeals for the seventh circuit and the supreme court of the state of Indiana. The latter court had declared that the proceedings by which the contiguous territory was annexed to the city of Hammond were legal, and, therefore, that that

[11] 166 U. S. 506, 514, 515, 17 S. Ct. 665, 41 L. Ed. 1095.

territory was to be considered by all the officers of the state of Indiana as within the territorial limits of the city. The United States circuit court of appeals by its decision in this case had declared that such annexation proceedings were invalid; and that the property of this petitioner was not within the city limits. This tract of plaintiff's was not on the extreme limit of the lands sought to be incorporated into the city, and if the decision of the circuit court of appeals was enforced there would be a tract of a few hundred acres within the exterior boundaries of the city of Hammond, as defined by the judgment of the supreme court of the state, withdrawn from the city's jurisdiction, and in fact excepted from its territorial limits. All the unfortunate possibilities of conflict and collision which might arise from these adverse decisions were suggested when this application for certiorari was made, and, although no final decree had been entered, it seemed to us a duty to bring the case and the question here for examination at the earliest possible moment."

The similarity of the question involved in this decision and that involved in this petition will be noted by the Court.

III.

Specifications of Error.

The errors intended to be urged are those specified in the accompanying petition under the heading "Questions Presented" at pages 7 and 8, numbered 1 to 6, the same being assigned as errors.

IV.

ARGUMENT.

1.

The United States Circuit Court of Appeals herein erred in attributing to an act of the Illinois Commerce Commission (Exhibit "D") a meaning and effect forbidden by the statute authorizing its issuance.

Under this heading we respectfully call the Court's attention to the fact that in arriving at its conclusion the Court below placed the same upon an erroneous basis, in considering Exhibit D a legislative act.

The Public Utilities Act under which the Illinois Commerce Commission acted herein conferred plenary power upon the Illinois Commerce Commission to pass upon all questions in which the reasonableness of the rates charged by carriers are involved.

Section 32 [12] thereof so far as applicable is as follows:

> "All rates or other charges made, demanded or received by any public utility, * * * for any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge made, demanded or received for such * * * service is hereby prohibited and declared unlawful."

Section 60 [13] provides:

> "The Commission * * * shall have power to hold investigations, inquiries and hearings concerning any

[12] Chap. 111⅔, Rev. Stat., S. B. A. Ed., 1939, par. 32, 111⅔, Sec. 32.
[13] Chap. 111⅔, I. R. D., S. B. A. Ed., 1939, par. 64, 111⅔, Sec. 60.

matters covered by the provisions of this Act, or by any other Acts, relating to public utilities subject to such rules and regulations as the commission may establish."

Section 72 [14] of the Act is in words as follows:

"When complaint has been made to the Commission concerning *any rate* * or other charge of any public utility and the Commission has found, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the Commission may order the public utility make due reparation to the complainant therefor, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount."

It is obvious that jurisdiction was invested in the Illinois Commerce Commission to pass upon the reasonableness of the rates herein as it has done.

It is also obvious that the sections above quoted specifically prescribe that it was unlawful for any public utility to charge any unreasonable rate for its service and the Commission was empowered to investigate upon complaint or upon its own motion *any rate* charged by a public utility at *any* time and Section 72 gave the Commission the right to award reparation against *any rate* which is excessive.

The Public Utilities Act of Illinois contains no provision giving to the Illinois Commerce Commission the power to fix a reasonable schedule of maximum rates, but

[14] Chap. 111⅔, I. R. D., S. B. A. Ed., 1939, par. 76, 111⅔, Sec. 72.
* Italics ours.

is wholly silent on that subject. This power is given it solely by the provisions of Section 8 [15] of the so-called act to prevent extortion and unjust discrimination which is as follows:

> "Sec. 8. The railroad and warehouse commissioners are hereby directed to make, for each of the railroad corporations doing business in this state, as soon as practicable, a schedule of reasonable maximum rates of charges for the transportation of passengers and freights, and cars of each of said railroads; and said schedules shall in all suits brought against such railroad corporations wherein is, in any way involved the charges of any such railroad corporation for the transportation of any passenger or freight, or cars, or unjust discrimination in relation thereto, *be deemed and taken in all courts of this state as prima facie evidence that the rates therein fixed, are reasonable maximum rates of charges for the transportation of passengers and freights, and cars upon the railroads for which said schedules may have been respectively prepared.*" (Italics ours.) [16]

The above mentioned act was passed prior to the organization of the present Illinois Commerce Commission or its predecessor. The present Public Utilities Act, passed in 1921, contains the following provision in Section 87 [17] thereof:

> "Nothing in this Act shall be construed to repeal any other Act or part thereof conferring power on said Board of Railroad and Warehouse Commissioners or on the State Public Utilities Commission or the Public Utilities Commission except such as are in direct conflict therewith, but the rights, powers and duties conferred by such other Act or Acts upon the Board of Railroad and Warehouse Commissioners, the State Public Utilities Commission, and the Public Utilities Commission shall be continued in full force

[15] Chap. 114, I. R. S., 1939 S. B. A. Ed., par. 125, p. 2591.
[16] Chap. 114, I. R. S. 1939, S. B. A. Ed., par. 125, p. 2591.

and transferred to the Illinois Commerce Commission, it being the intent of this Act to substitute with respect to such other Act or Acts the Illinois Commerce Commission for the Public Utilities Commission." [17]

At the time of the passage of said Section 8 of the Extortion Act the courts of common law had jurisdiction to pass upon all questions of reparation, which power was taken away from the Courts in the first instance and invested in the Illinois Commerce Commission under Section 72 [17] of the Public Utilities Act, and by said Section 8 [16] and nowhere else therein has the Illinois Commerce Commission been invested with the power of fixing statewide schedules of reasonable maximum rates, so it follows that the only power given the Commission to fix a schedule of reasonable maximum rates (Exhibit "D" herein) is given solely by Section 8 [16] of the Extortion Act aforesaid.

Construing the above quoted provisions of the Public Utilities Act *in pari materia* with Section 8 of the act to prevent extortion, etc., quoted as above set forth, it clearly appears that the Illinois Commerce Commission had jurisdiction to determine the reasonableness of the rates charged herein. The so-called schedule of maximum rates (Exhibit "D," Tr. 193-213), being by statute, which authorized the same, merely *prima facie* evidence on the subject matter of the reasonableness of the schedule of maximum rates, it follows that the Master correctly stated the law in the supplemental report which was approved by the trial Judge in stating:

"(f) Under the Statute of the State of Illinois and the decisions of the Illinois Supreme Court, the effect given to Defendant's Exhibit "D" is that it

[17] Chap. 111⅔, I. R. S. 1939, S. B. A. Ed., par. 91, 111⅔, Sec. 87.

was *prima facie* evidence of the reasonableness of the rates and casts the burden upon the claimants to show that the rates were unreasonable. In the absence of evidence before the Master to the contrary, the presumption arises that the claimants met this burden of proof in the hearing before the Illinois Commerce Commission.

"(g) It is also the Law of the State of Illinois that a reasonable maximum rate means simply a reasonable limit beyond which the railroads cannot go in fixing the rates." (Tr. 250.)

The rates assailed and condemned by the Commission had never been prescribed or fixed by the Illinois Commerce Commission under any authority contained in the Public Utilities Act and therefore did not present a legislative question. On the contrary they are within the purview of the so-called reasonable maximum scale of rates passed under Section 8 of the Extortion Act, and the question of reasonableness was an open question for the Commission to pass upon from the evidence before it, which included this Exhibit "D". This it did in this case.

The Court below evidently considered Exhibit "D" (Tr. 193-213), to be a legislative act, whereas the act under which it was passed specifically provides that it is a rule of evidence, being only *prima facie* evidence on the reasonableness of the rates charged, which question was presented to the Commission and rebutted by evidence heard by it and is concluded by the orders of the Commission entered herein—Exhibits "1" and "2" (Tr. 98-130).

The petitioner, the respondent, the United States District Court and the United States Circuit Court of Appeals herein all agree that in adopting this Schedule of Reasonable Maximum Rates, Exhibit "D" herein, the Illinois Commerce Commission was acting under the special power conferred upon it by Section 8 [19] of the Extortion Act.

2.

The act authorizing the order, Exhibit "D," in this case did not confer upon the Illinois Commerce Commission any jurisdiction to pass a legislative act.

It is well settled law in the State of Illinois as determined in *C. B. & Q. R. R. Co.* v. *Jones, supra,*[18] that the statute, Section 8[19] of the Extortion Act could not be held to be a legislative act. If so considered the act itself would be unconstitutional and the act of the Commission thereunder would be a nullity.

This *C. B. & Q. R. R. Co.* v. *Jones* case[18] was a suit in debt brought by a shipper against the carrier to recover for alleged overcharges on intrastate shipments. Judge Magruder in the opinion of said case made an exhaustive discussion of the power granted the Railroad and Warehouse Commission under said Section 8[19] and held specifically that in entering such an order the Commission was not acting in a legislative capacity, but that by reason of the provisions of said statute, the order entered thereunder was only *prima facie* evidence as to the reasonableness of the rate, placing the burden upon such subject matter upon the complainants, and was merely prescribing a rule of evidence, the Court saying on pages 381-382:

> "That act *does not establish* reasonable maximum rates, nor does it delegate to the board of railroad and warehouse commissioners *the power to establish such rates.* When a board is authorized to make a schedule of rates, and their schedule is merely given the force and effect of *prima facie* evidence as to the reasonableness of the rates in a suit involving the question of such reasonableness, *there is no delegation to the board of the legislative power to establish rates.* The legislature thereby merely refrains from

[18] 149 Ill. 361, 381, 382.
[19] Chap. 114, I. R. S. 1939, S. B. A. Ed., par. 125, p. 2591.

the exercise of its constitutional power, and, by leaving the question as to the reasonableness of the rates open, makes room for the exercise by the courts of their jurisdiction upon the subject. The final tribunal of arbitrament is not the judiciary, but the legislature. But 'when the legislature declares that the charges shall be reasonable, or, which is the same thing, allows the common law rule to that effect to prevail, and leaves the matter there; then resort may be had to the courts to inquire judicially whether the charges are reasonable.' (116 U. S. page 462)." (Italics ours.)

In the case of *The People* v. *Brady*,[20] the Court on page 105 made reference to the *C. B. & Q. R. R. Co.* v. *Jones* case,[21] *supra*, in the following language:

"In *Chicago Burlington & Quincy Railroad Co.* v. *Jones*, 149 Ill. 361, the constitutionality of an act of the General Assembly of this State was upheld as not being an attempted delegation of legislative power. The act provided: 'The railroad and warehouse commissioners are hereby directed to make for each of the railroad corporations doing business in this State, as soon as practicable, a schedule of reasonable maximum rates of the charges for the transportation of passengers and freight,' etc."

It is obvious that a board like the Illinois Commerce Commission has no powers excepting those specifically given it by statute, and Exhibit "D" (Tr. 193-213) being passed under Section 8[22] of the Extortion Act, can be considered only as evidence bearing upon the reasonableness of the rate charged.

---

[20] 271 Ill. 100, 105.
[21] 149 Ill. 361.
[22] Chap. 114, I. R. S. 1939, S. B. A. Ed., par. 125, p. 2591.

While the opinion in the case of *C. B. & Q. R. R. Co.* v. *Jones*[21] was rendered before the institution of the Illinois Commerce Commission and the awarding of reparation was invested in common law courts, nobody questions the power to determine the reasonableness of rates was taken from the courts and lodged in the Illinois Commerce Commission.

In the case of *Public Utilities Com.* v. *C. & W. T. Ry. Co.*,[23] the carriers on July 1, 1913 had established a passenger rate of 5c per mile from Chicago to La Grange and intermediate points. Thereafter on December 30, 1913 the carriers increased this rate and filed their schedules with the Public Utilities Commission covering such increase. Petitions were filed by the relators before the Commission, asking that the carriers be directed to return to the old rate. An order was entered accordingly and an appeal taken to the State Supreme Court which held that the Commission should have heard evidence on the subject matter of the reasonableness of the increased charge.

In the course of its opinion the Court said (pp. 566, 567):

> "Section 72 of the act (Public Utilities Act) provides that when complaint has been made to the commission concerning any rate, and the commission has found, *after a hearing*, that a public utility has charged an excessive or unjustly discriminatory amount for any service, the commission may order that the public utility make due reparation to the complainants therefor, with legal interest from the date of payment of the illegal charge. The statute thus affords a remedy against the continuation of excessive or unjustly discriminatory rates by establishing just and reasonable ones through the commission and at the same

[23] 275 Ill. 555, 566, 567, 568, 569.

time empowers it to compel reparation for overcharges."

And again on pages 568-569 the Court said:

"It is argued by appellant that it is beyond the power of the commission to interfere with a railroad organized under the Railroad act in the fixing of its passenger rates so long as it does not discriminate. The basis of this contention is that the legislature, in pursuance of section 12 of article 11 of the constitution of 1870, passed the Maximum Fare law of 1907 fixing the reasonable maximum fare at two cents a mile, and that the fixing of a reasonable maximum rate by the legislature was, in effect, the fixing of a reasonable rate under the direction of the constitution, and that such reasonable rate cannot be fixed or changed except by a direct act of the legislature. We are not able to sustain this contention upon any authority or reason. No authority is cited in support thereof. Said act of 1907 was especially saved from repeal by section 41 of the Public Utilities act. The plain meaning of a reasonable maximum rate, as used in the act of 1907 and as used in said section of the constitution, is simply a reasonable limit beyond which the railroads cannot go in fixing their rates, and by section 41 aforesaid the commission cannot go beyond or higher than that rate in fixing a just and reasonable rate. The commission is explicitly authorized to fix a rate lower than the two cents per mile if the evidence shows that a lower rate is just and reasonable and sufficient, and such provision is not in violation of said section of the constitution."

We respectfully submit that these decisions, each of which involved the construction of a schedule of reasonable maximum rates, established beyond question that a schedule of reasonable maximum rates passed under the authority of Section 8 [24] of the Extortion Act is merely a

[24] Chap. 114, I. R. S. 1939, S. B. A. Ed., par. 125, p. 2591.

rule of evidence and not a legislative act. There is no decision in the State Supreme Court to the contrary where the question was squarely in issue.

3.

The uniform practice and procedure which has obtained before the Illinois Commerce Commission for many years past is that the effect of a schedule of reasonable maximum rates, when introduced into evidence before the Commission, is only prima facie proof, placing the burden upon the complainants of proving that such rates are unreasonable. The decision of the Circuit Court of Appeals destroys a common law and statutory right heretofore inherent in the residents of the State of Illinois.

The Court will notice that this finding is contained in the record herein (Exhibit "5", Tr. 156), where the Commission said:

> "The record shows that the rates complained of are the same or somewhat lower than the Illinois Distance Maximum Scale. This being the case, the burden of proof is upon the complainants to show that such rates are unjust, unreasonable or otherwise unlawful, in accordance with the decisions of the Supreme Court of Illinois in *Public Utilities Com.* v. *A. T. & S. F. Ry. Co.*, 278 Ill. 58, *Commerce Com.* v. *C. C. C. & St. L. Ry. Co.*, 320 Ill. 214."

An examination of this latter case, *Commerce Com.* v. *C. C. C. & St. L. Ry. Co.*,[25] shows that the claim before the Commission was for the establishment of a lower rate and reparation. The decision shows that the rate complained of was the result of the increases and decreases made during the World War and thereafter, one of which was an order directing a general reduction of 10 per cent on all freight issued under the same authority as Exhibit "D" herein, and the Court said on page 219:

---

[25] 320 Ill. 214, 219.

"The burden of proof was on the brick company to show that the rate of which it complains is unreasonable. (*Public Utilities Com.* v. *Atchison, Topeka and Santa Fe Railway Co.*, 278 Ill. 58.)"

The decision did not hold that said order of reduction was legislative in character, but held that the evidence before the Commission did not justify the relief asked for and remanded it to the Commerce Commission for further proceedings.

See also Tr. 104 and 123.

A few of the many representative cases in which the effect of the same ruling was observed by the Illinois Commerce Commission are:

Egyptian Tie & Timber Company v. *M. P. Ry. Co., et al.*, 5 Ill. C. C. 447, 448, 450, 451;

Western Stoneware Company, et al. v. *C. B. & Q. R. R. Co.*, 5 Ill. C. C. 561,

where the Commission said on page 564:

"Defendants also show that at the present time the rates actually applied for the transportation of bituminous coal are substantially less than the maximum rates prescribed by the Commission. It has never been contemplated that the maximum rates prescribed by the Commission should be applied for the transportation of bituminous coal."

Robert Atkinson v. *C. B. & Q. Ry. Co.*, 5 Ill. C. C. 559;

Warfield Lumber and Coal Co. v. *C. B. & Q. Ry. Co.*, 5 Ill. C. C. 626;

Northwestern Timber Company v. *A. T. & S. F. Ry. Co.*, 5 Ill. C. C. 429, 430;

Northwestern Timber Company, et al. v. *A. T. & S. F. Ry. Co., et al.*, 6 Ill. C. C. 540, 541;

Castleman Brothers Timber Company and Paul & Washburn v. *B. & O. R. R. Co., et al.*, 6 Ill. C. C. 755, 756;
Egyptian Tie and Timber Co. v. *M. P. R. R. Co.*, 6 Ill. C. C. 757, 759, 761, 764;
Egyptian Tie & Timber Company v. *M. P. R. R. Co.*, 6 Ill. C. C. 142, 146, 148;
City of East Moline, et al. v. *A. T. & S. F. Ry. Co.*, 7 Ill. C. C. 848,

where the Commission said on page 853:

> "The Illinois maximum scale of rates on coal is seldom applied between points in the State of Illinois and was made higher than it would otherwise have been made had it not been that the commission desired, at the urgent request of the coal operators and railroads of this state, to avoid disturbing the present method of grouping mines and applying a common rate from the entire group to common destinations."

Anderson Coal & Ice Co., et al. v. *C. B. & Q. R. R. Co., et al.*, 7 Ill. C. C. 828, 831; and
Moline Chamber of Commerce, et al. v. *C. B. & Q. R. R. Co., et al.*, 7 Ill. C. C. 835, 838.

These cases demonstrate the public effect caused by the decision herein complained of and the ruling of the Circuit Court of Appeals would have made impossible the awarding of reparation in the above cases.

In Illinois the doctrine of contemporaneous construction to the effect that where the execution of a statute is confined to a particular department of the Government, the Court will regard and in doubtful cases adopt the construction acted on in such department and long continued practice therein may reduce the uncertainty to a fixed rule.

Comstock v. *Cover*,[26] *People* v. *Fidelity and Casualty Co.*,[27] *C. T. & T. Co.* v. *Central Republic Trust Co.*,[28] and *Barrett* v. *Reuter*.[29]

The Court will notice that the order, Exhibit "D" (Tr. 193-213) on its face is applicable not only to the receivers of The Chicago and Alton Railroad Company but every common carrier operating in intrastate traffic in the State of Illinois is enumerated therein (Tr. 196, 197, 198). Therefore the effect of this decision is statewide and affects every shipper in the State of Illinois, depriving them of their common law and statutory rights.

The decision herein complained of being "squarely in the teeth" of the statute and the holding in *C. B. & Q. R. R. Co.* v. *Jones*,[30] *supra*, it cannot but have the effect of limiting and destroying the power of the Commission to award reparation, as provided under Section 72 of the Public Utilities Act.

4.

The decision of the United States Circuit Court of Appeals herein is contrary to the decisions of said Court in the Fifth Circuit, wherein similar orders were held to be ineffective as legislative acts because they did not establish specific rates for the transportation involved and that rates adopted under similar circumstances were carrier-made rates and always open to inquiry as to their reasonableness.

The order, Exhibit "D" (Tr. 193-213), herein does not purport to deal specifically with the rates involved in this proceeding. In fact, it negatives such a contention

---

[26] 35 Ill. 470.
[27] 153 Ill. 25, 39.
[28] 299 Ill. App. 483, 496.
[29] 289 Ill. App. 221, 230.
[30] 149 Ill. 361.

(Tr. 85, 86, 194, 195). It was entered as a mere approval of the carriers' request for statewide readjustment of the war rates, to conform with a like order of the Interstate Commerce Commission (Tr. 158, 159), and does not pretend to pass upon any specific rates, as will appear from the cases hereinafter cited, they were carrier-made rates as distinguished from commission-made rates, and are always open to question.

This order was entered by the Commission for the purpose of making the freight rates on intrastate shipments conform to the rates on interstate shipments, which rates had been increased during the World War under order of the Director General and subsequently by common carriers by permission of the Interstate Commerce Commission.

It recites the previous orders of the Commission, one of which specifically provided:

> "Nothing contained herein shall be construed as an approval of the reasonableness of the individual intrastate rates as such. On the contrary, the purpose of this order is to give State approval to the application of the general percentage increase of intrastate rates fixed by the Interstate Commerce Commission in case 11703" (Tr. 195).

This affirmatively shows that so far as specific rates were concerned in permitting the increase, the Commission negatived the contention that its action bore in any way upon the reasonableness of the individual intrastate rates as such.

The order continued:

> "The Commission having fully considered all of the evidence adduced and all the representations and arguments herein and being fully advised in the premises finds that the level of rates fixed by the

Interstate Commerce Commission and observed on interstate traffic between points in the Eastern District, including Illinois, should be observed in Illinois" (Tr. 195).

The order then continued:

"The Commission further finds that to accomplish this the Schedule of Reasonable Maximum Rates of Charges for the Transportation of Freight No. 2, issued by the Illinois Commerce Commission, hereby made a part of this order, should be approved for intrastate application in the State of Illinois" (Tr. 195-196).

"It Is Therefore Ordered that the Schedule of Reasonable Maximum Rates of Charges for the Transportation of Freight No. 2, issued by the Illinois Commerce Commission be, and the same is hereby declared to be the maximum rates of charges for the transportation of freight intrastate in the State of Illinois on the following railroads:" (Enumerating all the railroads in Illinois including the Receivers of the Chicago & Alton Railroad Company.) (Tr. 196.)

Thus it affirmatively appears from the order itself that the Commission did not deal with the reasonableness of any specific rates, leaving to the carrier the right by its tariffs to fix rates within the limits permitted in the order as carrier-made rates and not commission-made rates.

It is obvious that, as affirmatively appears from the sections of the Illinois Commerce Commission Act above quoted, which in mandatory language forbids the collection by the carrier of an unreasonable rate, and vested in the Commission the power to determine whether the rates charged by it were or were not unreasonable that the subject matter of a rate fixed by the carrier would be an

open question for the Commission to pass upon regardless of this Exhibit "D" (Tr. 193-213).

This principle is specifically recognized in the case of *Arizona Grocery Co.* v. *A. T. & S. F. Ry Co.*,[31] where the Court said on page 388:

> "As respects a rate made by the carrier its adjudication finds the facts and may involve a liability to pay reparation."[32]

See also *Eagle Cotton Oil Co.* v. *Southern Ry. Co.*,[33] where the Court said on page 445:

> "The decision of the Circuit Court of Appeals for the 9th Circuit in *A. T. & S. F. Ry. Co.* v. *Arizona Grocery Co.*, 49 F. (2d) 563, to the effect that the Commission was without jurisdiction to award reparation, proceeded on the theory that the rates there involved were Commission-made. The rate here involved in our opinion was made by the carriers, and if it was, of course, the Commission, upon a valid finding that it was excessive, had the power to award reparation."

It affirmatively appears from the opinion in this *Eagle Cotton Oil Co.* case,[34] *supra,* that the rates therein involved were precisely the same as the rates involved herein. Compare the opinion in *Eagle Cotton Oil Co.* case, *Texas & Pacific Ry. Co.* v. *Louisiana Oil & Refining Co.*,[35] and the record (Tr. 90, 157-159, 194-195) herein, and also what is shown on the face of Exhibit "D" (Tr. 194, 195).

---

[31] 284 U. S. 370, 388.

[32] The Supreme Court held that the rate involved in the **Arizona Grocery Company case** was a commission-made rate.

[33] 51 Fed. (2d) 443, 445 (5th Circuit).

[34] 51 Fed. (2d) 443 (5th Circuit).

The court said in *Texas & Pacific Ry. Co.* v. *Louisiana Oil & Refining Co.*,[35] on page 468, *et seq.*:

"All of these orders, as the reports show, were made under the influence of the war, and of the inflation and deflation which were its aftermath. The controlling considerations in these proceedings were the general ones of obtaining revenue for the carriers, while meeting the need of and stimulating shipping and business. The reasonableness of particular or specific rates was neither determined nor considered; the orders were blanket orders revising all rates upward at one time, downward at another. If these proceedings are construed to be specific fixings of specific rates, they have resulted in making substantially all rates commission made, for general in their terms, they gave sanctions for and applied sanctions to, every tariff schedule the country over. That it was not meant by the *Arizona Grocery Company* case to hold rates made as these were commission made, is made certain, we think, by this statement in the opinion, 'it is also to be observed that, so long as the act continues in its present form, the great mass of rates will be carrier-made rates.' 284 U. S. 390, 52 S. Ct. 183-186. This could not be so if the general sanctions of the commissions' orders in the 'Increased Rates of 1920' and 'Reduced Rates, 1922' proceedings, amounted to commission prescribing or approval of all tariffs promulgated pursuant thereto. Our case of *Eagle Cotton Oil Co.* was as to the question involved, the same case as this. The rates for which reparation was awarded there was a rate made up, as these were, under the general sanctions of this war and after war general orders. The view we took there, and take here, that rates made as these were not commission-made rates is in accord, we think, with the *Arizona Grocery* case, and in accord with the interpretation the Supreme Court has given that case in *Great Northern R. R.* v. *Sunburst*, 287 U. S. 358, 53 S. Ct. 145, 77 L. Ed. 360, 85 A. L. R. 254. It is in accord, too, with the *Brimstone* case, 276

[35] 76 Fed. (2d) 465, 468, et seq.

U. S. 104, 48 S. Ct. 282, 72 L. Ed. 487, and with *United States* v. *Louisiana,* 290 U. S. 70, 54 S. Ct. 28, 78 L. Ed. 181."

Note the similarity between the rates in Exhibit "D" (Tr. 90, 157-159, 194, 195), and those commented upon in the *Louisiana* and *Eagle Cotton Oil Company* cases.

5.

The United States Circuit Court of Appeals in its opinion erred in construing the holdings in C. B. & Q. R. R. Co. v. Jones, 149 Ill. 361, C. B. & Q. R. Co. v. The People, 77 Ill. 443, Public Utilities Commission v. A. T. & S. F. Ry. Co., 278 Ill. 58, and Arizona Grocery Company v. A. T. & S. F. Ry. Company, 284 U. S. 370, and in the conclusions drawn therefrom.

The Court will notice that of the three Illinois cases above mentioned the only one thereof that is similar to the case at bar is *C. B. & Q. R. R. Co.* v. *Jones,*[36] *supra.* This was a suit in debt wherein the amended declaration set forth several counts based upon the claim for penalty due to overcharges exacted by the carrier exceeded the schedule of reasonable maximum rates prescribed by the Railroad and Warehouse Commission, but the last count thereof did not count on the statute, but averred that for certain shipments the rates charged and received were unreasonable and that the appellant became indebted to the appellee for the overcharges in excess of a reasonable rate. The jury rendered a verdict for the plaintiff for $2,868.60, and the court rendered a judgment upon the verdict and added thereto an attorney's fee. By demurrers, pleas and instructions given to the jury the question of the validity and the legal effect of the schedule of

[36] 149 Ill. 361.

reasonable maximum rates, which was introduced into evidence, prescribed by the Railroad and Warehouse Commission, was presented and passed upon by the Court, wherein the Court among other things, held specifically that the schedule of reasonable maximum rates was merely a rule of evidence, having only *prima facie* effect on the subject matter of the reasonableness of the rates charged.

The Court will notice that the reparation granted the plaintiff is in odd numbers and such numbers would not be used unless they were acting under the last count mentioned.

The Court will notice that the United States Circuit Court of Appeals in its opinion in referring to this *Jones* case (Tr. 288) erred in considering that it involved the recovery of a penalty only. The fact of the matter is that it was a judgment for reparation under the last count.

Taking into consideration that the question of determining the reasonableness of the rates charged was transferred from the common law courts to the Illinois Commerce Commission, the decision in the *Jones* case, *supra*, is a "red letter" case on "all fours" to the case at bar.

The case of *C. B. & Q. R. Co.* v. *The People*,[37] *supra*, was also an action in debt to recover penalties under the act to prevent extortion and also contained a count for unjust discrimination. A demurrer was filed to the pleas, which was sustained. The defendant contended that the demurrer should be carried back to the declaration and sustained against it, which contention the Court below overruled. The defendant elected to abide by its pleas.

[37] 77 Ill. 443.

A jury was waived and the Court fixed the penalty for violating the statute at $1,000.00. No question of reparation was involved in the case.

The Court will notice that the amount of $1,000.00 was fixed as a penalty and the precise amount of damages due to the reparation was not considered, which distinguishes the case from that of *C. B. & Q. R. R. Co.* v. *Jones*,[38] *supra*.

The Court held that the demurrer should be carried back to the declaration and sustained against it instead of the pleas and the judgment was reversed.

As to the holding in this case the Circuit Court of Appeals said (Tr. 288).

> "The court further stated that there would be no liability for unreasonable charges 'for taking the rates fixed by the schedule, or less rates, * * * even though proof might be made that the rates so taken were more than fair and reasonable rates.' In short, the Supreme Court of Illinois construed the language to mean that the rates fixed by the schedule were the maximum rates which could be 'deemed and taken in all courts' as *prima facie* reasonable; but the Court also recognized that rates higher than those fixed in the schedule could be charged without violating the extortion act if such rates were proved to be reasonable. Such rates, however, since they were higher than the maximum reasonable rates of the schedule, could not be 'deemed and taken in all courts' as being *prima facie* reasonable."

It appears from the above quotation that the United States Circuit Court of Appeals was confused in drawing its conclusion from the opinion in this case. Even from the quotation above recited the proper conclusion is that

---

[38] 149 Ill. 361.

the maximum scale is not conclusive even if higher rates were collected by the carriers provided that such higher rates were reasonable. In equality before the law, if the rates collected were below the schedule of reasonable maximum rates they could still be found by the commission to be unreasonable. See *Barris* v. *Chicago B. & Q. R. Co.*, p. 341, *infra*,[39] pp. 44-45. The Schedule of maximum rates merely being a rule of evidence, it places upon the contestants the burden of proving the reasonableness, and is not a legislative act.

The case of *Public Utilities Commission* v. *A. T. & S. F. Ry. Co.*,[40] *supra*, was an appeal from a judgment of the State Circuit Court affirming an order of the State Public Utilities Commission, which disapproved a proposed increase of rates sought by the carriers on intrastate shipments. The carriers filed with both the Interstate Commerce Commission and the Railroad and Warehouse Commission, predecessor of the Public Utilities Commission, schedules increasing the rates on grain. Certain associations and chambers of commerce filed a petition with the Railroad and Warehouse Commission, objecting to and protesting against the increases made by the tariffs.

Back in 1906 the Railroad and Warehouse Commission had fixed a schedule of maximum rates. Subsequently the carriers filed tariffs proposing certain increased rates. The Railroad and Warehouse Commission suspended and postponed the effective date thereof until after the passage of the act creating the Public Utilities Commission.

The Public Utilities Commission after a hearing further suspended said schedule and finally disapproved of the proposed increase. An appeal was taken to the Circuit

[39] 102 Iowa 375, 71 N. W. 339, 63 Am. St. Rep. 449.
[40] 278 Ill. 58.

Court of Sangamon County, where the order of the Public Utilities Commission was affirmed and the carriers brought the case to the Supreme Court of Illinois.

In this case there was no claim for reparation involved. The question involved was the right of the carriers to increase the rates and the Court considered the petition of the petitioners a protest against such proposed increases and heard evidence on that subject matter.

The Court held that the evidence presented was not sufficient to justify the increases and the judgment was reversed with instructions to the Commission to hear further evidence on that subject matter.

In its decision the Court held that where the schedule of reasonable maximum rates, was introduced into evidence, rates within the limits of that schedule could not be suspended by the Railroad and Warehouse Commission, which it had sought to do, but that the Public Utilities Commission had such power, and that its action in so doing was valid.

In its order the Commission had held that the schedule of reasonable maximum rates placed the burden of proof on the subject matter of reasonableness upon the carriers. This the Court held to be error and that the correct rule was that such schedule placed the burden of showing the unreasonableness of the proposed increase upon the protestants. This clearly indicates that in adopting a schedule of reasonable maximum rates the Commission was not acting in a legislative capacity, but was merely establishing a rule of evidence between litigants.

In the course of its decision, among other things, the Court said, page 69:

> "One of the principal duties of the Railroad and Warehouse Commission was to fix a schedule of reasonable maximum rates and to change the same from time to time, as might be necessary under changing conditions of transportation. When such schedules were made and the charges fixed the carriers were required to file their tariffs, not exceeding the charges so fixed, and there can be no question but that it was the right of the carriers to fix their charges and be entitled to collect for freight transported accordingly. When the commission had done this its power was exhausted" (Tr. 289-290).

From which quotation the United States Circuit Court of Appeals drew the conclusion that the Illinois Supreme Court recognized the right of the carriers to fix their charges in accordance with schedules and to collect for freight transported on the basis of such rates, as though it were a legislative act.

In drawing this conclusion we respectfully submit that the United States Circuit Court of Appeals erred in giving an effect to the language quoted as though the Commission were acting in a legislative capacity.

The United States Circuit Court of Appeals basing its conclusion upon the above quotation brushed aside the specific holdings in *C. B. & Q. R. R. Co.* v. *Jones* case and *C. B. & Q. R. Co.* v. *The People* case with a statement that they were suits to recover penalties, and "left no doubt that the construction of the language in question in the earlier decision (*Jones case*) represented the true legislative intent and did not represent a strict construction for the purposes of a penalty suit."

It then drew the conclusion that the decisions of the State Supreme Court were to the effect that the adoption by the Illinois Commerce Commission of a reasonable

schedule of maximum rates was a legislative act fixing rates for the future and precluding any inquiry into the reasonableness of the rates charged.

We respectfully submit that we have shown that the subject matter before the Court in the *Jones case* was a judgment for reparation rendered notwithstanding the existence of a schedule of reasonable maximum rates being involved in the case.

The Court does not suggest any reason why the conclusion as to the legislative feature would be any different in a suit for reparation than it would be in a suit for penalty and there is no such reason.

The language of an opinion must be construed with reference to the facts and questions involved in the case in which it was rendered.

Public Utilities Com. v. *A. T. & S. F. Ry. Co.* case did not involve reparation. The main question in that case was whether the evidence was sufficient to support the findings of the order of the Commission as well as the power of the Commission to suspend attempted increased rates and incidentally the Court held that the Railroad and Warehouse Commission in adopting a schedule of reasonable maximum rates had exhausted its power on that subject matter, and the language quoted was used to justify the Court's conclusion to that effect.

It is clear that the Illinois Supreme Court did not have in mind any question of a complaint for reparation in the language quoted. This quotation merely restates the requirement of Sections 37 and 39[41] of the Public Utilities

[41] Chap. 111⅔, I. R. S. 1939, S. B. A. Ed., pars. 37, 39, 111⅔, Secs. 37, 39.

Act and has regard only to the duties of a common carrier in collecting freight rates.

It is obvious that this language when applied to a situation involving a claim for reparation would be clearly *obiter dictum* and certainly could not be held to overrule former decisions specifically holding to the contrary.

What the Illinois Supreme Court meant in the latter case was a recital of the well known limitations upon carriers charging for their services. A carrier is required to file tariffs and to collect the specific rates as therein provided, no greater or no less, any lesser rate than the tariff would constitute rebating, which is specifically forbidden by the statute.

When a Court overrules a former decision it always does it in specific terms. Neither the *Jones case, supra,* nor *Peoples case, supra* was ever mentioned in this *Public Utilities case, supra.* It is a strange contention that a court by *obiter dictum* would overrule its former decisions, without reference thereto, on a different subject matter.

It does not follow that because "it was the right of the carriers to fix their charges and be entitled to collect for freight transported accordingly" that the carrier could violate the provisions of the Public Utilities Act providing that every charge must be reasonable and non-discriminatory. We have already shown by the terms of Section 8 [42] of the Extortion Act and the *Jones case* that that was an open question to be passed upon by the Illinois Commerce Commission.

---

[42] Chap. 114, I. R. S. 1939, S. B. A. Ed., par. 125, p. 2591.

The result of the decision of the United States Circuit Court of Appeals operates to deprive shippers in Illinois of their constitutional rights.

The Illinois Constitution of 1870, Article II, Section 19, provides:

> "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly, and without delay."

Shippers without question had a common law right to enforce their claims for damages suffered by unlawful, excessive and discriminatory charges for transportation of their commodities by common carriers. By the Public Utilities Act, Section 72 [43] the legislature provided a special method of enforcing this common law right, but did not pretend to abolish the right, as was said in *Public Utilities Com.* v. *C. & W. T. Ry. Co.*,[44] *supra*, at page 567:

> "The statute thus affords a remedy against the continuation of excessive or unjustly discriminatory rates by establishing just and reasonable ones through the commission and at the same time empowers it to compel reparation for overcharges."

The effect of the Circuit Court of Appeals' decision, if allowed to stand, not only destroys shippers' common law rights, but abolishes and renders nugatory every statutory power conferred upon the Illinois Commerce Commission regarding rates of carriers, leaving in force only a power to adopt a reasonable maximum rate, which when issued could not be impeached or contested, although the statute authorizing the same provides specifically to the

---

[43] Chap. 111⅔, I. R. S. 1939, S. B. A. Ed., par. 76, 111⅔, Sec. 72.
[44] 275 Ill. 555.

contrary. This, of course, would leave all shippers at the mercy of the carriers and deprive them of any relief for excessive or discriminatory charges.

When you consider that the State Supreme Court in *C. B. & Q. R. R. Co.* v. *Jones*,[45] *supra*, a suit which involved a claim for reparation for overcharges made while a reasonable maximum scale of rates was existing, and held that the claimant was entitled thereto and specifically held that Section 8[46] of the Extortion Act, which provided for the schedule of reasonable maximum rates was under the terms of the statute merely *prima facie* evidence on the subject matter of reasonableness of the rates charged, placing the burden of proof on the protestants, and was not a legislative act on the part of the Commission, which case has never been overruled and has been followed by the Commission since its organization, we submit that the United States Circuit Court of Appeals erred in concluding that the above *obiter dictum* quotation from *Public Utilities Com.* v. *A. T. & S. F. R. Co.*, *supra*, overruled the doctrine as stated in the *Jones* case.

We further call the Court's attention to the language following the said quotation from the *Public Utilities Commission* v. *A. T. & S. F. Ry. Co.*[47] case *supra*, which was omitted from the opinion in the United States Circuit Court of Appeals, namely:

> "Of course, under such schedule there might be some individual cases of discrimination that would be cause for complaint and investigation, but there is no question of that kind in this case."

This emphasizes our contention that our State Supreme Court did not intend by its decision to prevent inquiry

[45] 149 Ill. 361.
[46] Chap. 114, I. R. S. 1939, S. B. A. Ed., par. 125, p. 2591.

as to the lawfulness of any rate charged under the maximum schedule of rates.

The record shows that the question of discrimination was raised in this case and passed upon favorably to complainants by the Commission.

The complaint before the Commission (Tr. 99, 104) charged that the rates complained of were excessive and unjustly discriminatory.

The orders of the Commission (Tr. 115, 119, 125-129) find that the specific rates fixed were the just, reasonable and non-discriminatory rates and that reparation should be awarded the complainants on the shipments.

The evidence heard by the Commission not being shown herein, the presumption follows that there was evidence which bore upon the question of discrimination and justified the finding of the Commission in that regard.

The United States Circuit Court of Appeals further seeks to justify its action by the holding in the case of *Arizona Grocery Company* v. *A. T. & S. F. R. Co.*[48] The order in this case was entered not by any State Commission, but by the Interstate Commerce Commission under a specific power given by the Interstate Commerce Statute, Section 15, where on complaint or on its own motion after a full hearing the Interstate Commerce Commission was given the power to fix the specific rate thereafter to be charged.

In this *Arizona Grocery Company case*[49] the Court held that where the Interstate Commerce Commission in its

---

[47] 278 Ill. 58.
[48] 284 U. S. 370.
[49] 284 U. S. 370.

legislative capacity, upon complaint and after hearing, declared the reasonable rate to be charged by a carrier, it might not at a later time, upon the same or additional evidence as to the fact situation existing when the order was entered, declare its prior finding as to reasonableness erroneous and due to the fact that the Commission acting upon complaint and after hearing under Sections 13 (1) and 15 acted in a legislative capacity, obviously it could not subsequently when acting in a quasi-judicial capacity, impeach its own legislative act. Obviously this ruling has no pertinency to the case at bar.

The Interstate Commerce Act contains no provision prescribing that rates have merely *prima facie* effect, placing the burden of the proof of reasonableness upon the protestants, as obtains in the State of Illinois.

6.

The District Court correctly interpreted the law herein in holding that the rates complained of being carrier-made, the Commission had power to grant reparation due to their being unjust, excessive and discriminatory.

As to the cases cited in the footnote of the opinion (Tr. 286) to the above proposition the Court said:

> "The prevailing view is contrary to the District Court's holding. See Annotations 97 A. L. R. 406; 9 Am. Jur. Sec. 175; *Montana Horse Products Co.* v. *Great Northern Ry. Co.*, 7 Pac. 2nd 919."

We have examined the cases referred to in this footnote and so far as any of them bear upon the subject matter of reparation they support our contention that where the rates involved are commission-made reparation is not allowed, but where they are carrier-made, reparation may be awarded. As was stated in *Montana Horse Products Co.* v. *Great Northern Ry. Co.*,[50] on page 923:

[50] 7 Pac. 2nd 919, 921, 923.

> "Rates under the Interstate Commerce Act are voluntary rates initiated and filed by the carriers, rather than prescribed or approved by the commission as under our laws. (Citing cases.) And the Interstate Commerce Commission is given power by the act to declare a rate unreasonable or discriminatory retroactively and to award reparation. No such power is given to the commission under our statutes."

The opinion on page 921 said:

> "By section 3794 it is provided, so far as pertinent, that power and authority is by the act vested in the board of railroad commissioners, and it is thereby made its duty 'to adopt, as soon as practicable,[51] all necessary rates, charges and regulations to govern and regulate freight and passenger tariffs'."

No such power is given under Illinois Statutes. See, however, the case of *Barris* v. *Chicago, B. & Q. R. Co.*,[51] 102 Iowa 375, 71 N. W. 339, 63 Am. St. Rep. 449, found in said annotations 97 A. L. R. 406, 426. This case is on "all fours" to the case at bar, wherein the Commission fixed a schedule of reasonable maximum rates, which under the statute was deemed *prima facie* evidence of the reasonableness thereof. The Court said, page 340:

> "We think it is nowhere claimed that the commissioners' schedule is intended to deprive the railway company of reasonable rates for transportation of freight; that is, if the schedule makes a rate that is less than reasonable the company may recover the reasonable rate, and in any action by the company to recover a rate in excess of the schedule rate the only effect of Sec. 17 would be to make the schedule rate *prima facie* reasonable, so that the company must overcome that effect by proof. The language of Sec. 2 is that 'all charges . . . shall be reasonable and just.' It is no more restrictive than permissive. It fixes the rights of both parties by a re-enactment of

[51] 97 A. L. R. 406, 426.

the common law. Confessedly, Sec. 17 does not operate to the prejudice of the company if the commissioners shall err in judgment and fix a rate less than what is reasonable. It seems to us the section has the same force and effect as to both parties. If the commissioners err in judgment and fix a rate too high to be reasonable, why should the shipper be required to pay it, or the company, if it receives it, be permitted to keep it? It will be seen that Sec. 17, when carefully read, does not attempt to deal with facts or conditions that are conclusive, but those that are *prima facie* only. Largely, its office is to fix a rule of evidence. That is one of the purposes of the act as indicated by its title. It is likely true that the purpose of the act, as to evidence, may have been intended more for proceedings before the commissioners than in courts; but it is equally true that it does fix a rule of evidence in courts."

The Court further said on page 341:

"It would seem to be a strange construction to so construe the language of the law as to make the schedules but *prima facie* as to the carrier and conclusive as to the shipper. Equality before the law is the correct rule, and should obtain in the absence of a clear legislative intent to the contrary."

In the above case the Iowa Supreme Court stated that the Iowa and Illinois Acts were substantially similar on the subject matter. The above citations emphasize the principle that a Commission-made rate is a legislative act, preventing reparation, but a carrier-made rate is always open as to its reasonableness when charged.

The Illinois Commerce Commission herein fixed no rates. It merely fixed a schedule of reasonable maximum rates acting under Section 8 [52] of the Extortion Act, which specifically provided that its action thereunder should

be only a rule of evidence, affecting the subject matter of reasonableness, the power to determine which was invested in the Commission and was determined by the Commission in this case.

CONCLUSION.

The petitioner, the respondent, the United States District Court and the United States Circuit Court of Appeals herein all agree that the authority of the Illinois Commerce Commission in adopting this schedule of reasonable maximum rates—Exhibit "D" (Tr. 193-213) herein, was acting under the special power conferred upon the Commission by Section 8 [52] of the Extortion Act, and we respectfully submit that the United States Circuit Court of Appeals herein erred in attributing to said Exhibit "D" (Tr. 193-213) the effect of a legislative act, which was specifically forbidden by the act, which authorized its issuance; that all of the above mentioned cases of the Illinois Supreme Court adhered to the language found in said section forbidding any other interpretation than that given by the act; that the said schedule of reasonable maximum rates is not and cannot be considered in the nature of a legislative act, but is merely a rule of evidence affecting the burden of proof on the subject of reasonableness; that the subject of determining the reasonableness of the rates charged is invested by statute solely in the Illinois Commerce Commission and the reparation orders entered herein were made after the introduction of said Exhibit "D" (Tr. 193-213) before it, and other evidence heard in rebutting the same, and that said finding on the subject matter of reasonableness was an administrative question, the decision of which is invested in the Commission and not in the Court. This decision by holding that a schedule

of reasonable maximum rates passed under the authority of Section 8 [53] of the Extortion Act, was a legislative act, the schedule being statewide and affecting every carrier in Illinois, which decision is certainly contrary to law and controlling decisions, deprives every shipper in Illinois of his constitutional right of having a remedy for the damages he suffers from the unlawful acts of carriers and thereby involves a question of great public interest. For this reason we respectfully submit that by reason of the importance of the decision, it should be inquired into by this Honorable Court by a writ of certiorari.

Respectfully submitted,

THOMAS B. LANTRY,
C. B. CARDY,
WILLIAM F. GARMAN,
Attorneys for Petitioner.

Dated April 2, 1941.

Certificate of Service.

The undersigned attorneys for respondent hereby acknowledge notice of the filing of the petition and receipt of a copy of the petition, printed record and supporting brief, this 2nd day of April, 1941.

.....

.....

.....

.....

Attorneys for Respondent.
1400 First National Bank Bldg.,
Chicago, Illinois.

---

[52] Chap. 114, I. R. S. 1939, S. B. A. Ed., par. 125, p. 2591.
[53] Chap. 114, I. R. S. 1939, S. B. A. Ed., par. 125, p. 2591.

(29)

Office - Supreme Court, U. S.
FILED
APR 19 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 921

FUNKS GROVE GRAIN COMPANY,
Petitioner,

vs.

THE ALTON RAILROAD COMPANY.
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

SILAS H. STRAWN,
FRANK H. TOWNER,
GUY A. GLADSON,
BRYCE L. HAMILTON,
Counsel for Respondent.

State Law Printing Company, 173 W. Madison St., Chicago—FRAnklin 5501

INDEX.

PAGE

OPINION BELOW 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 6

ARGUMENT 9

I. The conclusion of the Circuit Court of Appeals that the Illinois Commerce Commission has no power to award reparation with respect to rates which did not exceed its own schedule of reasonable maximum rates is not in conflict with applicable local statutes or applicable decisions 9

1. The Illinois Commerce Commission's schedule of reasonable maximum rates is not merely prima facie evidence of the reasonableness of rates assessed in the past in a proceeding before the Commission 10

2. The order of the Illinois Commerce Commission prescribing a schedule of reasonable maximum rates was a legislative act 15

3. The views of the Illinois Commerce Commission as to the legal effect of its schedules of reasonable maximum rates have no authoritative value 18

4. The legal effect of the schedule of reasonable maximum rates cannot be avoided by calling the tariff rates assessed carrier-made rates 19

5. The question of discrimination is not presented 20

PAGE

II. The decisions of the Circuit Court of Appeals for the Fifth Circuit cited by petitioner have no bearing on the issue in the case at bar..... 21

III. The reparation award is ineffective and void because the conclusion of the Illinois Commerce Commission that the rates under attack were excessive is not based upon sufficient findings of fact 23

1. The findings made by the Illinois Commerce Commission respecting the reasonableness of the assailed rates are merely conclusions 24

2. Even if the discussion of the evidence be treated as a series of findings, it is insufficient to support the award..... 25

IV. The reparation award is arbitrary and unreasonable because the Illinois Commerce Commission failed to test the reasonableness of the assailed group rates by average group distances 29

CONCLUSION 31

LIST OF AUTHORITIES.

CASES.

Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co., 284 U. S. 370 .....17, 19, 20, 23

Atchison, T. & S. F. Ry. Co. v. Commerce Commission, 335 Ill. 624 .....19, 25, 26, 27

Baer Bros. Mercantile Co. v. Denver & R. G. R. R. Co., 233 U. S. 479 11

Barris v. C. B. & Q. R. R. Co., 102 Iowa 375..... 20

PAGE

Brotherhood v. New York Central R. R. Co., 339 Ill. 201 24

Chicago, Burlington & Quincy R. R. Co. v. The People, 77 Ill. 443 ..... 11, 12, 16, 20

Chicago, Burlington & Quincy R. R. Co. v. Jones, 149 Ill. 361 ..... 12, 15, 16, 20

Chicago Railways Co. v. Commerce Commission, 336 Ill. 51 24

Chicago, Rock Island & Pacific Ry. Co. v. United States, 284 U. S. 80 30

Chicago & E. I. Ry. Co. v. Commerce Commission, 341 Ill. 277 ..... 19, 26

Chicago & E. I. Ry. Co. v. Commerce Commission, 343 Ill. 117 ..... 25, 26

City of Chicago v. Ben Alpert, Inc., 368 Ill. 282 16

City of Elmhurst v. Western Gas Co., 363 Ill. 144 18

Commerce Commission v. C. C. C. & St. L. Ry. Co., 320 Ill. 214 18

Eagle Cotton Oil Co. v. Southern Ry. Co., 51 F. (2d) 443 ..... 22, 23

Indiana Harbor Belt R. R. Co. v. Commerce Commission, 340 Ill. 304 16

Jackson Traffic Bureau v. Alabama G. S. R. Co., 186 I. C. C. 57 30

Louisville & Nashville R. R. Co. v. Commerce Commission, 353 Ill. 375 24

Marion & Eastern R. R. Co. v. Illinois Central R. R. Co., 245 Ill. App. 83 11

Parks v. Libby-Owens-Ford Glass Co., 360 Ill. 130 16

People v. Brady, 271 Ill. 100 16

People v. Building & Loan Ass'n., 369 Ill. 518 16

PAGE

People's Fruit Ass'n. v. Commerce Commission, 351 Ill. 329 24

Public Utilities Commission v. Atchison, T. & S. F. Ry. Co., 278 Ill. 58 ..... 13, 14, 20

Public Utilities Commission v. C. & W. T. Ry. Co., 275 Ill. 555 17

Public Utilities Commission v. Springfield Gas Co., 291 Ill. 209 ..... 16, 28

Robinson v. B. & O. R. R. Co., 222 U. S. 506 19

Rockwell Lime Co. v. Commerce Commission, 373 Ill. 309 ..... 19, 23

Texas Steel Co. v. Ft. Worth & D. C. Ry. Co., 45 S. W. (2d) 794 18

Texas & Pacific Ry. Co. v. Louisiana Oil & Refining Co., 76 F. (2d) 465 22

United States v. Chicago Heights Trucking Co., 310 U. S. 344 ..... 16, 18

STATUTES.

Illinois Laws 1871, p. 618 9

Illinois Laws 1913, p. 460 9

Illinois Laws 1913, pp. 501-2 9

Illinois Revised Statutes 1939, Chapter 111⅔:

Section 69 23

Section 76 10

Section 91 10

Illinois Revised Statutes 1939, Chapter 114:

Section 118 11

Sections 121-4 11

Section 125 ..... 9, 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 921

FUNKS GROVE GRAIN COMPANY,
Petitioner,

vs.

THE ALTON RAILROAD COMPANY.
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

MAY IT PLEASE THE COURT:

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in the advance sheets, 117 F.(2d) 210. The District Court did not write an opinion.

STATEMENT OF THE CASE.

This case involves a claim for the enforcement of a reparation award entered by the Illinois Commerce Commission in favor of petitioner, a corporation engaged in the coal business at Funks Grove and McLean, Illinois.

(R. 2-3, 38-40, 100) The award was predicated on the collection by the Receivers of the properties of The Chicago and Alton Railroad Company of allegedly excessive rates on Illinois intrastate shipments of coal. (R. 119-29, 218, 281) The claim was filed in the receivership proceeding of The Chicago and Alton Railroad Company, and was there defended by respondent, the assignee of the purchasers at judicial sale of the railroad properties. (R. 2, 41-47, 77, 281) A judgment enforcing the award was entered by the District Court against respondent on May 8, 1940 (R. 258-9), and this judgment was reversed by the Circuit Court of Appeals for the Seventh Circuit on December 14, 1940, in an opinion (R. 281-90) which contains an able and clear analysis of the pertinent provisions of the Illinois law and decisions.

The case before the Illinois Commerce Commission arose on complaints of petitioner and other coal dealers against a large group of common carriers by rail, including the Receivers of The Chicago and Alton Railroad Company. (R. 98-100, 218, 282) The complaints alleged that the rates charged for the transportation of bituminous coal from mines at Lincoln and Springfield, Illinois, to various Illinois destinations were excessive, unjust, unreasonable and discriminatory. (R. 99, 218, 282) The rates complained of were at all times within the limits of the Commission's own schedule of reasonable maximum rates. (R. 104, 204, 285)

On May 26, 1931, the Commission entered an order covering shipments transported by the Receivers of The Chicago and Alton Railroad Company. (R. 98-117, 282) This order did not, as asserted by petitioner (Petition 3), find "what would have been the just, reasonable and non-discriminatory rates which should have been charged for such shipments," but merely found that

the just, reasonable and non-discriminatory rates "are" (*i. e.*, on May 26, 1931) certain stated amounts. (R. 115) This finding did not in any way relate to the past, or to any shipment which had theretofore been made. (See report of Special Master Lundahl, R. 21-22, 28-32) In the order the Commission concluded that reparation "should be awarded" on shipments previously made, but that the complainants and the carriers should compromise the reparation claim. (R. 115, 282) The Commission also found that petitioner and other complainants had paid and borne "unjust, unreasonable and excessive freight charges," and were "entitled to an award of reparation," but made no finding that any rate assessed in the past was unjustly discriminatory. (R. 116) The order required the defendant carriers to establish rates for the future, and directed the parties to compromise the reparation claim. (R. 116-17, 282)

Shortly after the entry of that order, namely, on July 18, 1931, respondent acquired the properties of The Chicago and Alton Railroad Company as assignee of the purchasers thereof at judicial sale. (R. 77, 281-2) The decree of foreclosure and sale provided that the purchaser or its assignee should pay all unpaid liabilities of the Receivers incurred in the operation of the railroad. (R. 93-94, 282) Petitioner filed its claim based on the Commission's order of May 26, 1931, and respondent filed a motion to dismiss the claim. (R. 2-3, 219, 282) The claim was referred to Herbert A. Lundahl, Special Master, who rendered a report in which he found that the Commission's order of May 26, 1931, was not an enforceable award of reparation, and recommended that the motion to dismiss be granted. (R. 17-34, 282)

Petitioner and other claimants thereafter secured a reopening of the proceeding before the Commission. (R. 78, 130, 181-92, 282-3) After further hearings, the Commission on March 17, 1939, entered a reparation order in

favor of petitioner and others. (R. 119-29, 283) This order found that petitioner had paid "unjust, unreasonable and excessive freight charges" (R. 125), and awarded reparation "on account of the collection by said Receivers of unjust, unreasonable and excessive charges." (R. 128) The order contains no finding of unjust discrimination. The shipments covered by the award in favor of petitioner all originated at Springfield, Illinois, and were consigned to McLean and Funks Grove, Illinois, 44.2 and 48.8 miles, respectively, northeast of Springfield.* (R. 5, 12-15, 104, 215)

After the entry of the reparation award, the District Court gave petitioner leave to file an amendment to its claim based on the award, and vacated the report of Special Master Lundahl, which had not been acted upon and did not cover the amended claim. (R. 34-35, 37, 283) Respondent filed an answer to the amended claim, and petitioner a reply. (R. 41-48, 283) Petitioner's amended claim and other similar claims were referred to Master Charles A. McDonald for hearing and report. (R. 48, 283) The claim of one claimant, Frank Cheek, was heard first, and by stipulation it was agreed that the record on that claim should be considered and taken as the record on the other claims. (R. 56-57, 95-97, 220) The Master, in his several reports, recommended that the claims be allowed (R. 217-26, 248-51, 283), and the District Court entered an order approving both reports and adopting the findings and conclusions of the Master. (R. 257-8, 283) On appeal the Circuit Court of Appeals for the Seventh Circuit held that since the rates found excessive by the Commission were at all times within the limits of the Commission's own

* The list of shipments attached to the original claim also show cars from Sherman, Selbytown and Williamsville, Illinois, but these shipments were eliminated by the Commission in its order of March 17, 1939, because they originated at points not involved in the complaint filed with the Commission. (R. 6-11, 123)

schedule of reasonable maximum rates (R. 104, 204, 285), the Commission was without power to repeal its own enactment with retroactive effect, and reversed the judgment of the District Court. (R. 285-90)

In the argument which follows, we reply under Sections I and II to the argument advanced by petitioner in support of the petition for certiorari, and in Sections III and IV give additional reasons for denial of the writ.

SUMMARY OF ARGUMENT.

I.

The decision of the Circuit Court of Appeals is not in conflict with applicable local statutes or applicable decisions.

The rates assessed on every one of petitioner's shipments did not exceed the Illinois Commerce Commission's own schedule of reasonable maximum rates prescribed pursuant to the requirements of an act of the Illinois Legislature. Under the decisions of the Supreme Court of Illinois, a rate which, when assessed, does not exceed the Commission's schedule of reasonable maximum rates is a just and reasonable rate, and may only be reduced by an order running to the future. A rate which exceeds the schedule is prima facie unreasonable, but the carrier may show that the rate was in fact reasonable.

The order of the Commission prescribing the schedule was an enactment legislative in character.

The administrative views of the Commission with respect to the legal effect of its schedule of reasonable maximum rates have no authoritative value.

The legal effect of the schedule of reasonable maximum rates prescribed by the Commission cannot be avoided by calling the tariff rates which were assessed carrier-made rates.

The Commission did not award reparation for unjust discrimination, and petitioner's claim filed in the District Court was not based on that ground. There is therefore no question of discrimination presented.

II.

The decisions of the Circuit Court of Appeals for the Fifth Circuit cited by petitioner have no bearing on the issue in the present case. The orders of the Interstate Commerce Commission involved in the cases decided by the Circuit Court of Appeals for the Fifth Circuit did not fix, or even purport to fix, reasonable maximum rates, whereas the order of the Illinois Commerce Commission here involved specifically fixed certain named rates as reasonable maximum rates.

III.

The reparation award is ineffective and void because the conclusion of the Illinois Commerce Commission that the rates under attack were excessive is not based upon sufficient findings of fact.

The Illinois Public Utilities Act, as construed by the highest court of the State, requires that an order of the Commission be based upon specific findings of fact which afford a reasonable basis for the order. The portions of the orders of the Illinois Commerce Commission specifically designated as its findings, insofar as they relate to the reasonableness of the assailed rates, are mere conclusions, which, under the decisions of the Supreme Court of Illinois, are not sufficient to support an order. Resort may not be had to discussion of the evidence contained in the orders to supply the deficiencies in the findings.

Even if the discussion of the evidence be treated as a series of findings, it is insufficient to support the reparation award. The orders of the Commission disclose three possible bases for the final conclusion that the rates were excessive. The first—a comparison of the per-

centage of increase of the rates complained of with the percentage of increase of rates generally from 1917 to some undisclosed later date—was expressly stated by the Commission as not being sufficient, in itself, to show that any rate was too high. The second possible basis—comparison of the assailed rates with other rates—does not support the award because the Commission failed to make a complete statement of the transportation conditions affecting the assailed rates and the compared rates. Such findings are indispensable under the decisions of the Supreme Court of Illinois. The third possible basis—an inference that other carriers compromised the claims made against them—admittedly is not based on evidence of record, and is obviously not a proper foundation for the award.

IV.

The award is arbitrary and unreasonable because the Illinois Commerce Commission failed to test the reasonableness of the assailed group rates by average group distances, although the Commission itself stated that the proper method to test group rates was by comparisons based on the average distances from the rate group.

ARGUMENT.

I.

The conclusion of the Circuit Court of Appeals that the Illinois Commerce Commission has no power to award reparation with respect to rates which did not exceed its own schedule of reasonable maximum rates is not in conflict with applicable local statutes or applicable decisions.

There have been three tribunals in Illinois having jurisdiction over rates of common carriers by rail. The first was the Railroad and Warehouse Commission, created in 1871. (Ill. Laws 1871, p. 618) This commission had no power to award reparation. One of its principal functions was the promulgation of schedules of reasonable maximum rates, and the revision thereof from time to time, pursuant to Section 8 of An Act to prevent extortion and unjust discrimination, which was adopted in 1873 to carry out mandates imposed by the Illinois Constitution, and is still in force. (Ill. Rev. Stat. 1939, c. 114, sec. 125; and pp. 61-62, Ill. Const. Art. 11, secs. 12 and 15) The second regulatory commission was the Public Utilities Commission, created by the Public Utilities Act of 1913. (Ill. Laws 1913, p. 460) In 1921, the present Public Utilities Act was adopted, which created the Illinois Commerce Commission. (Ill. Rev. Stat. 1939, c. 111⅔) The provisions of the two public utility acts, in so far as they are here pertinent, are identical. The power and duty of the Railroad and Warehouse Commission under the Act of 1873 to prescribe and revise schedules of reasonable maximum rates were transferred to the Public Utilities Commission by the Act of 1913 (Ill. Laws 1913, pp. 501-2), and to the

Illinois Commerce Commission by the Act of 1921. (Ill. Rev. Stat. 1939, c. 111⅔, sec. 91)

Pursuant to the statutory delegation, the Illinois Commerce Commission has from time to time established schedules of reasonable maximum rates. (R. 193-6) The rates assessed by the Receivers of The Chicago and Alton Railroad Company on the shipments covered by the reparation award were all within the limits of the effective schedule of reasonable maximum rates,* as the Commission itself stated in its order of May 26, 1931. (R. 104) Throughout its petition, petitioner impliedly concedes that it was at no time charged a rate exceeding the Commission's schedule.

1. The Illinois Commerce Commission's schedule of reasonable maximum rates is not merely prima facie evidence of the reasonableness of rates assessed in the past in a proceeding before the Commission.

Petitioner argues at length (Petition 15-19) that by the Act of 1873 the Commission's schedule of reasonable maximum rates is nothing more than prima facie evidence of reasonableness in a reparation proceeding before the Commission, and states (Petition 16) that Section 72 of the Public Utilities Act "gave the Commission the right to award reparation against *any rate* which is excessive." Section 72 empowers the Commission to award reparation only in case it "has found, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount." (Ill. Rev. Stat. 1939, c. 111⅔, sec. 76) As we have previously pointed out (*supra,* pp. 2-4), the Commission did not find that petitioner paid unjustly discriminatory rates, nor award reparation on that ground. The real

* The assailed rates and the distances for which they applied are shown in the Commission's order of May 26, 1931 (R. 104), and the reasonable maximum rates fixed by the Commission are shown in Exhibit D. (R. 204)

question, therefore, is not whether the power to award reparation for excessive charges exists, but whether the Commission, in determining whether a rate was "excessive," may disregard its own previously fixed and effective standards of reasonableness.

As the Circuit Court of Appeals pointed out (R. 288-9), when an administrative body prescribes a reasonable maximum rate for the future it performs a function legislative in character, and when it sits to award reparation the nature of its function is judicial. This distinction was explicitly recognized by the Illinois Appellate Court in *Marion & Eastern R. R. Co.* v. *Illinois Central R. R. Co.,* 245 Ill. App. 83, 90-91, where it cited the decision of this Court in *Baer Bros. Mercantile Co.* v. *Denver & R. G. R. R. Co.,* 233 U. S. 479.

The provision in the Act of 1873 that the schedules of reasonable maximum rates shall "be deemed and taken in all courts of this state as prima facie evidence that the rates therein fixed are reasonable maximum rates of charges," on which petitioner relies (Petition 17), has no bearing on the power of the Commission to award reparation, but, in terms, relates to suits in the courts. The act defined "extortion" as the charging of more than "a fair and reasonable rate," and authorized penalty suits by the State and damage suits by shippers based on extortion. (Ill. Rev. Stat. 1939, c. 114, secs. 118, 121-4)

In its opinion (R. 287-8), the Circuit Court of Appeals pointed out that the Supreme Court of Illinois in *Chicago, Burlington & Quincy R. R. Co.* v. *The People,* 77 Ill. 443, construed the Act of 1873 as imposing "no liability for unreasonable charges 'for taking the rates fixed by the schedule, or less rates, * * * even though proof might be made that the rates so taken were more than fair and reasonable rates.' " The Illinois Court, at pages

448 and 449, expressly held "that the declaration was * * * defective in not averring that a schedule of rates had been established by the board of commissioners, and that the defendant [carrier] had received compensation in excess of those rates." The contention of the State "that the statutory offense consists simply in receiving more than a fair and reasonable rate of compensation, and that the schedule of rates is but *prima facie* evidence of what is reasonable" was expressly rejected; and the Court said "the schedule of rates is something more than evidence—it is a fact upon which the action rests."

The contention is made (Petition 33-34) that *Chicago, Burlington & Quincy R. R. Co.* v. *The People, supra,* is not in point because "No question of reparation was involved in the case." It is true that the suit was not brought by a shipper; but since the Court held that the State could not recover penalties for extortion if the rates charged were within the limits of the Commission's schedule, it necessarily follows that a shipper could not recover damages for extortion in a like situation.

The effect of the schedule in a suit by a shipper was made clear by the Supreme Court of Illinois in *Chicago, Burlington & Quincy R. R. Co.* v. *Jones,* 149 Ill. 361. In that case the earlier decision in *Chicago, Burlington & Quincy R. R. Co.* v. *The People, supra,* was expressly approved, and the Court, at page 375, added:

> "The statutory counts of the declaration in the case at bar contain an averment, that a schedule of rates had been established by the board of commissioners, and that the defendant [carrier] had received compensation in excess of those rates. It thus avoids the defect, for which the declaration in *C. B. & Q. R. R. Co.* v. *The People, supra,* was condemned."

The discussion in the opinion in the *Jones Case* concerning the clause in the statute making the schedule prima facie evidence in suits in the courts was in answer to the contention of the carrier that the statute was unconstitutional. The Court held, at pages 380, 381 and 383, that since the statute merely made a rate in excess of the schedule prima facie unreasonable, and gave the carrier the opportunity to show that the rate was in fact reasonable, the carrier's constitutional right to a judicial determination was not infringed.

In an attempt to escape the plain fact that the Court in the *Jones Case* held that a shipper had no claim unless the carrier had exacted rates exceeding the schedule, petitioner states (Petition 32-33) that since the last count of the amended declaration was not based on the Act of 1873, but merely averred liability for charging unreasonable rates, and since the judgment was in odd numbers, it must be concluded that the judgment was "for reparation under the last count." Section 6 of the act, set forth on page 372 of the opinion, provided that a carrier exacting an extortionate charge would be liable to the shipper for treble damages, and not for a fixed penalty; hence no significance can be attached to the amount of the judgment. It is clear that the judgment could only have been rendered on the counts grounded upon the Act of 1873; for the Court sustained the validity of that act against the carrier's claim of unconstitutionality, and held at pages 397 and 398, on an assignment of cross-error by the shipper, that the last amended count was barred by the statute of limitations.

The question of the legal effect of the reasonable maximum schedule was again before the highest Court of Illinois in *Public Utilities Commission* v. *Atchison, T. & S. F. Ry. Co.*, 278 Ill. 58, which is reviewed in the opinion below. (R. 289-90) Petitioner asserts (Petition 36)

the Illinois Supreme Court held that the action of the Public Utilities Commission in suspending rates within the limits of the schedule was valid, and that in adopting the schedule the Commission "was merely establishing a rule of evidence between litigants"; and further asserts (Petition 38-39) that, since reparation was not involved, the statement of the Court that the carriers had the right to establish and collect rates within the limits of the schedule was merely dictum.

Careful analysis of the opinion in *Public Utilities Commission* v. *Atchison, T. & S. F. Ry. Co., supra,* will show that the Court held that rates within the limits of the schedule were lawful, *i. e.,* reasonable, rates which could only be changed for the future. The tariffs naming the increased rates were filed with the Railroad and Warehouse Commission, and suspended by it until January 8, 1914. On January 1, 1914, the Public Utilities Act of 1913, which created the Public Utilities Commission, became effective, and the new Commission entered an order further suspending the tariffs. The rates named in the tariffs did not exceed a schedule of reasonable maximum rates prescribed by the Railroad and Warehouse Commission which was continued in force by a saving clause in the Act of 1913. At page 69 the Court declared that there could be no question as to the right of the carriers to file tariffs naming rates within the limits of the schedule and "collect for freight transported accordingly." The Court stated, at page 70, that "the Railroad and Warehouse Commission had no power to arbitrarily suspend the rates in question and the Public Utilities Commission had no power, by its order of January 6, 1914, to suspend such rates, or to suspend them at all except after a hearing and taking evidence," but added that since the railroads had acquiesced in the void suspension orders, the Court would treat the case as one arising on complaint. At page 71, the Court said:

> "* * * maximum rates having been fixed and the order fixing such rates being still in force, any rates fixed by the railroads lower than the rates fixed by the commission would be lawful and reasonable charges, and the burden would be on the parties in interest protesting against such rates to establish the contrary. In other words, the question really before the Public Utilities Commission was not a question of raising rates but a question of lowering rates which the railroads might lawfully establish."

2. The order of the Illinois Commerce Commission prescribing a schedule of reasonable maximum rates was a legislative act.

The argument made by petitioner (Petition 20-24) that the order of the Commission fixing reasonable maximum rates was not a legislative act is primarily rested upon a statement in the opinion in *Chicago, Burlington & Quincy R. R. Co.* v. *Jones,* 149 Ill. 361, 382, that "there is no delegation to the board of the legislative power to establish rates." (Petition 20) The order fixing reasonable maximum rates, of course, was not an act of the Legislature itself, but it was an enactment, legislative in character, of an administrative body acting under and pursuant to a statute conferring power to adopt schedules of reasonable maximum rates.

The passage quoted by petitioner from the *Jones Case* is part of a discussion, appearing on pages 376-382 of the opinion, in which the Court held that Section 8 of the Act of 1873 was not an attempted delegation of legislative power, and the language quoted must be read in the light of the question to which it was addressed. When the discussion is read as a whole, it is clear that the Court had in mind the distinction between the power to make laws, which the Legislature cannot delegate, and the power of the Legislature to authorize administrative tribunals to adopt regulations and orders legislative in

character under standards declared by the Legislature.* Thus, at page 378, the Court said "the legislature may authorize others to do things which it might properly, but can not conveniently or advantageously, do itself."

The *Jones Case* was decided at a time when the nature of the functions of rate regulatory bodies was not so clearly understood as it is today. *Cf. United States* v. *Chicago Heights Trucking Co.,* 310 U. S. 344, 353, note 16. In later decisions the Supreme Court of Illinois has made it clear that the prescription of rates operative in futuro is legislative action. Thus in *Public Utilities Commission* v. *Springfield Gas Co.,* 291 Ill. 209, 213, the Court stated that the Commission in fixing rates acts "under authority delegated by the legislature"; and in *Indiana Harbor Belt R. R. Co.* v. *Commerce Commission,* 340 Ill. 304, 306, the Court declared:

> "The power to fix rates is legislative, whether exercised by the legislature directly or by an administrative body under delegated authority."

The argument made by petitioner is refuted by the actual decisions in *Chicago, Burlington & Quincy R. R. Co.* v. *The People,* 77 Ill. 443, and *Chicago, Burlington & Quincy R. R. Co.* v. *Jones,* 149 Ill. 361, where, as we have shown (*supra,* pp. 11-12), the Supreme Court of Illinois held that a condition precedent to liability for penalties or damages under the Act of 1873 was the exaction of rates in excess of the Commission's schedule. It would be strange for the Court to so hold if the schedule were not a legislative act. The argument is further refuted in *People* v. *Brady,* 271 Ill. 100, cited by petitioner (Petition 21), where the Court, at page 105, specifically stated that the *Jones Case* was one in which an act of the Legislature "was upheld as not being an attempted delega-

---

* This distinction has been pointed out by the Supreme Court of Illinois in many decisions. See, *e.g., Parks* v. *Libby-Owens-Ford Glass Co.,* 360 Ill. 130, 147-8; *City of Chicago* v. *Ben Alpert, Inc.,* 368 Ill. 282, 288; *People* v. *Building & Loan Ass'n.,* 369 Ill. 518, 527.

tion of legislative power," and, at page 106, that there is a "line which separates legislative power to make laws from administrative authority to make regulations or apply the legislative provisions."

The case of *Public Utilities Commission* v. *C. & W. T. Ry. Co.*, 275 Ill. 555, cited by petitioner (Petition 22-23), did not involve the Act of 1873. The issue was the validity of a temporary order prescribing passenger rates *for future application*, and a reasonable maximum rate within the meaning of the Maximum Fare Law of 1907 was described, at page 569, as "a reasonable limit" beyond which neither the railroads nor the Commission itself could go in fixing rates. The question of the power of the Commission to annul its own rate orders retrospectively was not presented. The Court's statement that the Commission could fix a rate lower than the statutory maximum "if the evidence shows that a lower rate is just and reasonable and sufficient" must be considered in the light of the fact that the Court had before it an order running to the future.

In *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, 386-9, cited in the opinion below (R. 288-9), this Court held that when the Interstate Commerce Commission fixed a maximum reasonable rate for the future it performed an act legislative in character, and that in a subsequent proceeding, when sitting in a quasi-judicial capacity to award reparation, "it was bound to recognize the validity of the rule of conduct prescribed by it and not to repeal its own enactment with retroactive effect."

Petitioner does not challenge the correctness of the decision in the *Arizona Grocery Case*, but argues (Petition 42-43) that the case is distinguishable because the earlier order fixing a maximum reasonable rate was entered upon complaint, whereas the Illinois Commission

acted upon its own motion in prescribing reasonable maximum rates. We have already shown that in prescribing a schedule of reasonable maximum rates the Illinois Commission exercises a function legislative in character. The fact that the Illinois Commission acted on its own motion does not destroy the legislative character of its order. *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, 353-4; *Texas Steel Co.* v. *Ft. Worth & D. C. Ry. Co.*, 45 S. W. (2d) 794, 796 (Tex.).

3. The views of the Illinois Commerce Commission as to the legal effect of its schedules of reasonable maximum rates have no authoritative value.

After pointing out that the Illinois Commerce Commission in its order of May 26, 1931, stated that the rates complained of were the same or somewhat lower than the reasonable maximum schedule, and that for this reason the burden of proof was upon complainants, petitioner cites *Commerce Commission* v. *C. C. C. & St. L. Ry. Co.*, 320 Ill. 214. (Petition 24-25) An examination of the opinion in that case discloses that neither the schedule nor the administrative views of the Commission concerning it are mentioned. The order of the Commission directed the carrier to establish a rate for the future, and to file a statement of the amount of reparation due the shipper in accordance with the Commission's findings, but no reparation award was made.

Decisions of the Commission are cited (Petition 25-26) in an effort to show that it has construed the Illinois statutes as authorizing it to repeal its own enactments with retroactive effect. The Supreme Court of Illinois has held, however, that decisions of public service commissions are not considered authority on questions of law. *City of Elmhurst* v. *Western Gas Co.*, 363 Ill. 144, 147. The Interstate Commerce Commission for many years thought that it had power to nullify its own rate

orders retrospectively, but this Court held otherwise in the *Arizona Grocery Case,* 284 U. S. 370.

Several decisions of the Illinois Commission are cited in an attempt to show, as a fact, that the Commission did not contemplate that the schedule should be applied on coal, and that the schedule was made higher than it would otherwise have been made in order to avoid disrupting the group system of rates. These particular decisions do not appear of record, and, for that reason alone, cannot be used as evidence of the correctness of the alleged facts recited therein. *Rockwell Lime Co.* v. *Commerce Commission,* 373 Ill. 309, 320-1; *Chicago & E. I. Ry. Co.* v. *Commerce Commission,* 341 Ill. 277, 285; *Atchison, T. & S. F. Ry. Co.* v. *Commerce Commission,* 335 Ill. 624, 635-6, 638, 640, 645; *cf. Robinson* v. *B. & O. R. R. Co.,* 222 U. S. 506, 512.

Even if the rule were otherwise, petitioner could not, by quotations from other decisions, impeach the legal effect of the schedule. On the cover page of the order prescribing the schedule, and in the order itself, the Commission specifically described the schedule as a "schedule of reasonable maximum rates of charges for the transportation of freight." (R. 193, 195, 196, 198) The Act of 1873 is controlling on the question of the legal effect of the schedule, and it declares that the rates in the schedule shall be "reasonable maximum rates of charges." (Ill. Rev. Stat. 1939, c. 114, sec. 125)

4. The legal effect of the schedule of reasonable maximum rates cannot be avoided by calling the tariff rates assessed carrier-made rates.

It is argued (Petition 43-46) that although "a Commission-made rate is a legislative act, preventing reparation," nevertheless "a carrier-made rate is always open as to its reasonableness when charged." Counsel for petitioner permit their reasoning to be confused by

labels. In *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.,* 284 U. S. 370, the maximum reasonable rate prescribed by the Interstate Commerce Commission was 96.5 cents. The carriers never published this rate. They first published 96 cents, thereafter 86.5 cents, and still later 84 cents. The two rates last named were the ones as to which reparation was awarded, although neither had been fixed by any order of the Commission; yet it was held, at page 389, that the carriers were entitled to rely upon the Commission's declaration as to what would be a maximum reasonable rate, and were entitled to protection when they published rates within the maximum limit prescribed. In *Public Utilities Commission* v. *Atchison, T. & S. F. Ry. Co.,* 278 Ill. 58, 69, 71, the Supreme Court of Illinois likewise held that rates within the limits of the Illinois Commission's own schedule of reasonable maximum rates were lawful rates which the carriers had the right to file and assess.

The decision of the Supreme Court of Iowa in *Barris* v. *C. B. & Q. R. R. Co.,* 102 Iowa 375, cited by petitioner (Petition 44-45), cannot be regarded as an authority on Illinois law in view of the clear expressions of the Supreme Court of Illinois in *Chicago, Burlington & Quincy R. R. Co.* v. *The People,* 77 Ill. 443, 447-9; *Chicago, Burlington & Quincy R. R. Co.* v. *Jones,* 149 Ill. 361, 375; and *Public Utilities Commission* v. *Atchison, T. & S. F. Ry. Co.,* 278 Ill. 58, 69, 71, all of which were carefully considered and reviewed by the Circuit Court of Appeals. (R. 288-90)

5. The question of discrimination is not presented.

In a desperate effort to persuade this Court that the Circuit Court of Appeals erred, attention is called (Petition 41-42) to a statement in *Public Utilities Commission* v. *Atchison, T. & S. F. Ry. Co.,* 278 Ill. 58, 69, that under the reasonable maximum schedule "there might

be some individual cases of discrimination that would be cause for complaint and investigation," and it is asserted that the Court below erred in failing to sustain the reparation award upon that ground. In our statement of the case (*supra,* pp. 2-4) it is pointed out that reparation was not awarded on the ground of unjust discrimination. Petitioner's claim, moreover, is not based on unjust discrimination. The original claim, based on the Commission's order of May 26, 1931, was for the difference between "unreasonable rates collected" and "rates found reasonable by the Commission," as shown on Exhibit B to the claim, plus interest and attorneys' fees. (R. 3) The amended claim, which alleges the reparation award of March 17, 1939, expressly states, in paragraph (6), that the Commission found petitioner was entitled to recover "the sum of $1211.46 as reparation and damages due on account of the collection of unjust, unreasonable and excessive charges," and claim is made for that sum together with interest and attorneys' fees. (R. 39-40)

II.

The decisions of the Circuit Court of Appeals for the Fifth Circuit cited by petitioner have no bearing on the issue in the case at bar.

By way of laying a foundation for citing several decisions in the Fifth Circuit upon which it relies, petitioner asserts (Petition 28) that the reasonable maximum schedule order "was entered as a mere approval of the carriers' request for statewide readjustment of the war rates, to conform with a like order of the Interstate Commerce Commission * * *, and does not pretend to pass upon any specific rates." The most casual inspection of the order will show that the rates were prescribed by the Illinois Commission after a hearing on its

own citation against the carriers to show cause why the schedule in effect on June 20, 1922, should not be reduced by ten per cent. (R. 194) There is nothing in the order to indicate that any of the carriers wanted the rates reduced; and the order shows on its face that the Illinois Commission found that the rates in the schedule should be lowered, and prescribed a new schedule of specific rates for specified distances. (R. 194-6, 203-5)

The decisions of the Circuit Court of Appeals for the Fifth Circuit in *Eagle Cotton Oil Co.* v. *Southern Ry. Co.*, 51 F. (2d) 443, and *Texas & Pacific Ry. Co.* v. *Louisiana Oil & Refining Co.*, 76 F. (2d) 465, cited by petitioner (Petition 30-32), hold that general permission given by the Interstate Commerce Commission to carriers to make percentage increases in their tariff rates, and blanket directions to make percentage reductions in such rates, do not constitute an approval or prescription of reasonable maximum rates. The orders of the Federal Commission involved in those cases did not fix, or even purport to fix, reasonable maximum rates.

In its order prescribing a schedule of reasonable maximum rates the Illinois Commission did not deal with the published tariff rates of the railroads, but solely with its own schedule. It entered no blanket order directing a reduction of ten per cent in the various rates named in the carriers' tariffs, irrespective of what they might be, but prescribed as reasonable maximum rates certain specific amounts for specified distances. (R. 196, 203-5)

The difference between the orders of the Interstate Commerce Commission involved in the Fifth Circuit cases and the order of the Illinois Commission fixing reasonable maximum rates makes it clear that the decisions of the Circuit Court of Appeals for the Fifth Circuit were not based "on the same matter," within the meaning of Rule 38 of this Court, as the decision of the

Circuit Court of Appeals for the Seventh Circuit which petitioner challenges. The *Eagle Cotton Oil Case,* moreover, was cited to this Court by counsel for the shipper in the *Arizona Grocery Case,* 284 U. S. at 373, 374, but apparently was not deemed in point because it is not cited in this Court's opinion.

III.

The reparation award is ineffective and void because the conclusion of the Illinois Commerce Commission that the rates under attack were excessive is not based upon sufficient findings of fact.

In *Rockwell Lime Co.* v. *Commerce Commission,* 373 Ill. 309, the Illinois Supreme Court discussed the requirements of Section 65 of the Public Utilities Act (Ill. Rev. Stat. 1939, c. 111⅔, sec. 69), saying (p. 322):

> "Section 65 of the Public Utilities act requires the Commerce Commission, at the conclusion of a hearing upon any complaint, to make and render findings concerning the subject matter and facts inquired into and to *enter its order based thereon.* This court has on numerous occasions announced that the findings of the Commerce Commission under section 65 *must be sufficiently specific* to enable an intelligent review of the commission's decision and to ascertain whether the facts, as found, *afford a reasonable basis for the order entered.* [Citations] When an administrative agency is required, as a condition precedent to an order, to make a finding of facts, *the validity of the order must rest upon the needed finding. Where lacking, the order, it follows necessarily, is ineffective.*" (Italics ours.)

The award made by the Commission on March 17, 1939, even when read together with its order of May 26, 1931, fails to comply with Section 65, and is therefore ineffective and void.

1. The findings made by the Illinois Commerce Commission respecting the reasonableness of the assailed rates are merely conclusions.

The 1931 order contains twenty-one pages devoted to a history of the litigation and a discussion of the evidence, followed by four findings, specifically designated as such, and the ordering paragraphs. (R. 98-117) The award of 1939 contains six pages devoted to preliminary discussion, and five findings, specifically designated as such, together with the ordering paragraphs. (R. 111-29) The only findings made with respect to the reasonableness of the assailed rates during the reparation period are the finding in the 1931 order that petitioner paid and bore unjust, unreasonable and excessive freight charges, and the finding in the 1939 order to the same effect. (R. 116, 125)

The Supreme Court of Illinois has repeatedly held that general conclusions respecting the ultimate issue in the case are insufficient to support an order of the Commerce Commission, and that supporting findings must be made. *Chicago Railways Co.* v. *Commerce Commission,* 336 Ill. 51, 63; *Brotherhood* v. *New York Central R. R. Co.,* 339 Ill. 201, 209; *Louisville & Nashville R. R. Co.* v. *Commerce Commission,* 353 Ill. 375, 377. The Court has also held that resort may not be had to discussion of evidence contained in an order of the Commission to supply the deficiencies in the findings. *Peoples Fruit Ass'n.* v. *Commerce Commission,* 351 Ill. 329, 332-3.

Since the only findings made in the orders of the Commission with respect to the reasonableness of the rates under attack are mere conclusions, the reparation award is void and ineffective under the authorities above cited.

2. Even if the discussion of the evidence be treated as a series of findings, it is insufficient to support the award.

For the purpose of this point we shall assume (but do not admit) that the discussion of the evidence contained in the 1931 and 1939 orders is a series of findings, and shall omit reference to discussion of evidence which has no bearing on petitioner's claim.*

A reading of the orders discloses three possible bases for the final conclusion that the assailed rates were excessive: (1) a comparison of the percentage of increase of the rates complained of with the percentage of increase of rates in Illinois generally from 1917 to some undisclosed later date; (2) comparisons of the rates complained of with other rates voluntarily established by carriers or prescribed by regulatory bodies; and (3) the Commission's statement that "While it does not appear from the record, the inference may be drawn that the defendants complained of in this proceeding—other than The Chicago and Alton Railroad Company and The Pennsylvania Railroad Company—did effect and adjust the claims and demands of the petitioners against such defendants." (R. 104-15, 121)

Percentage increase comparison: The comparison of percentage increases, as the Commission itself said, "is not, of itself, evidence that any rate is too high or too low or is unjustly discriminatory." (R. 105) See *Atchison, T. & S. F. Ry. Co.* v. *Commerce Commission,* 335 Ill. 624, 631; *Chicago & Eastern Illinois Ry. Co.* v. *Commerce Commission,* 343 Ill. 117, 125.

Rate comparisons: The second possible basis for the Commission's final conclusion—comparison of the as-

* For example, we shall not refer to the Commission's discussion of rates and transportation conditions on traffic from Lincoln, or to Atlanta, Shirley and Waynesville, since petitioner's shipments all originated at Springfield and moved to Funks Grove and McLean.

sailed rates with other rates—is the customary method, but the Supreme Court of Illinois has held that such comparisons may not be made unless findings are made which show that the transportation conditions affecting the rates used for purpose of comparison are substantially similar to the transportation conditions affecting the rates complained of. *Atchison, T. & S. F. Ry. Co.* v. *Commerce Commission,* 335 Ill. 624, 636; *Chicago & Eastern Illinois Ry. Co.* v. *Commerce Commission,* 341 Ill. 277, 284-5; *Chicago & Eastern Illinois Ry. Co.* v. *Commerce Commission,* 343 Ill. 117, 125. The Court in these cases specifically held that the transportation conditions must be set forth in specific findings in the order, and that findings showing distances, rates and earnings are not a sufficient basis for determination of the reasonableness of rates.

The only discussion relating to transportation conditions is found in the 1931 order, where the evidence before the Commission is described as follows:

> "The evidence concerning transportation conditions is voluminous and covers several hundred pages of testimony and includes statements showing the grades, degree of curves, the ruling grade, the maximum grades, the weight of rail, the kind of ballast, the traffic density, the assembling service, the average loading per car, the class of equipment used, the type of locomotive, the service at origins and destinations, and other conditions incident to the transportation services. The operating evidence submitted covers in detail operating conditions between many points in Illinois, Indiana and Ohio, and generally covers the lines over which rates used for comparative purposes apply." (R. 114)

In its discussion of the assailed rates the Commission stated that a single-line haul was involved, and that the annual movement of coal to the points of destination

concerned was not heavy. (R. 104-5) It discussed in general language the assembling and handling of cars at the mines at Springfield, stated that pusher service was required at Lawndale for trains of fifty cars or more, and said that the line of the Chicago and Alton was a double-track line on which northbound trains did not have to be sidetracked. (R. 113) The Commission further stated that there did not appear to be any unusually difficult operating conditions except the grade at Lawndale, but added "that the destination points are small stations to which the volume of tonnage is not large, that the movement is in local freight trains, and cannot be compared in volume to the tonnage received at many of the consuming points shown in rate comparisons." (R. 114-15) Nowhere in the order are there any findings showing the grades, degree of curves, ruling grade, maximum grade, weight of rail, kind of ballast, traffic density, class of equipment used, or types of locomotives employed in handling coal from Springfield to McLean and Funks Grove.* Thus the Commission, although it admits having the evidence before it, failed to make complete findings of fact showing all the transportation conditions affecting the handling of traffic under the rates assailed. This alone is a fatal defect.

The discussion of the compared rates is even more barren of facts showing transportation conditions. For the most part, such statements as are made are limited to rates, distances and earnings. (R. 105-13) The grades, degree of curves, ruling grades, maximum grades, weight of rail, kind of ballast, traffic density, assembling service, class of equipment used, types of locomotives, and the service at origins and destinations are nowhere stated. In the absence of specific findings

* For a discussion showing the importance attached by the Supreme Court of Illinois to some of these operating conditions see *Atchison, T. & S. F. Ry. Co.* v. *Commerce Commission*, 335 Ill. 624, 636-38, 640-43, 645-46.

showing the conditions of operation under the assailed and compared rates, the conclusion of the Commission that the rates under attack were excessive cannot rest on rate comparisons.

In its order of May 26, 1931, the Illinois Commerce Commission said:

> "Careful consideration has been given to the circumstances and conditions surrounding the movement of coal from * * * Springfield to the points in issue and also the rate comparisons and the transportation conditions surrounding the movement of coal between various points in Illinois, Indiana and Ohio." (R. 115)

The Commission cannot avoid the requirement laid down in the authorities above cited that it must make findings of fact showing the transportation conditions encountered by a statement that it gave them careful consideration.* In *Public Utilities Commission* v. *Springfield Gas Co.*, 291 Ill. 209, 235, the Court, in reviewing a rate order involving a valuation of property, held that a statement by the Commission that it had taken into consideration certain elements of value would not excuse its failure to make findings showing what those elements were.

Compromise by other carriers: The third possible basis on which the Commission may have rested its final conclusion falls by its own weight. In the first place, the Commission admits that the necessary evidence did not appear of record. (R. 121) In the second place, the fact, if it be one, that other carriers compromised and settled the reparation claims against them obviously could not properly have been given any weight by the Commission.

---

* In the statement quoted from the 1931 order the Commission states that it considered transportation conditions affecting rates in Illinois, Indiana and Ohio, and thereby impliedly admits that it gave no consideration whatever to the transportation conditions affecting rates in Missouri, Iowa, Wisconsin, Michigan, West Virginia and Pennsylvania, although rates in these six states are also discussed. (R. 105-13)

IV.

The reparation award is arbitrary and unreasonable because the Illinois Commerce Commission failed to test the reasonableness of the assailed group rates by average group distances.

In its order of May 26, 1931 the Illinois Commerce Commission said:

> "Several of the exhibits introduced by defendants show group rates and the average distance from the group. *A comparison of this kind* [*i. e.,* a comparison based on the average distance from the rate group] *is proper when group rates are used.* The assailed rates apply from the Springfield group to the destinations here involved and defendants have introduced evidence purporting to show rates from the entire Springfield group. This group extends from Lincoln on the north to Carlinville, Illinois, on the south. It also includes mines on the Nickel Plate Railroad at Coffeen, Panama and Sorento, and from mines on the Chicago and Illinois Midland Railway from Calloway to Taylorville, Illinois, inclusive. The average distance from Springfield proper to stations on the Chicago and Alton Railroad, Atlanta to Shirley, inclusive, is 46 miles." (R. 109; italics ours.)

Reference to the map introduced in evidence as Exhibit E will show the extent of the Springfield rate group. (R. 215) Carlinville, one of the points referred to, is a point on the Chicago and Alton railroad (now the Alton railroad) about forty miles south of Springfield; and the mines at Sorento, one of the points on the Nickel Plate (N. Y. C. & St. L.) referred to, are approximately sixty miles south of Springfield. (R. 215) As the Commission stated, the rate to a given destination from every origin in the entire Springfield group was the same. Petitioner's shipments moved from the mines at

Springfield proper in the northern part of the Springfield group where the distances to McLean and Funks Grove were obviously much shorter than the average distance from all mines in the group. (R. 215)

The group principle of rate-making has obvious advantages to producers and coal dealers; for under the group principle all producers in the rate group can ship to the same market at the same rate, and the coal dealers at the market are able to solicit bids from all mines. The reasonableness of a group rate, as the Illinois Commission expressly stated, should be tested by the average distances from all mines in the group. This is also the view of the Interstate Commerce Commission. *Jackson Traffic Bureau* v. *Alabama G. S. R. Co.,* 186 I. C. C. 57, 59. Any other method is arbitrary and unreasonable.

The Illinois Commission does not, in either of its orders, make any mention of the average distance from all mines in the Springfield group to any of the various destinations. In its order of May 26, 1931, the Commission states the distances from Springfield, Illinois, to the destinations here involved. (R. 104) In the excerpt quoted above from the order (*supra,* p. 29), the Commission stated the average distance from Springfield itself (not from all mines in the Springfield group) to the Chicago and Alton destinations. Its failure to even mention the average distances from all mines in the Springfield rate group to McLean and Funks Grove is conclusive evidence that it gave no consideration to the average distances from the group. The Commission would have had to make findings showing the average distances from all mines as a basis for comparisons predicated thereon. (See point III, *supra,* pp. 23, 24, 26.)

In *Chicago, Rock Island & Pacific Ry. Co.* v. *United States,* 284 U. S. 80, this Court had before it an order of the Interstate Commerce Commission in which, after

finding that all railroads were entitled to receive a fixed rental for the use of their cars by foreign lines, the Commission granted exemptions to short-line railroads. This Court held that portion of the order was arbitrary and unreasonable because it did not conform to the rule laid down by the Commission itself for all railroads.

The Illinois Commission's order of May 26, 1931, has the same vice. In the face of its own unqualified statement that comparisons based on the average distance from the rate group were proper in the case of group rates, the Commission proceeded to ignore its own standard. It follows that the 1931 order is arbitrary and unreasonable. Since that order is the foundation on which the reparation award of March 17, 1939, was entered, the award is also void.

CONCLUSION.

For the reasons stated above, we respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

SILAS H. STRAWN,
FRANK H. TOWNER,
GUY A. GLADSON,
BRYCE L. HAMILTON,
Counsel for Respondent.

April 18, 1941.